Supreme Court, U. S.
FILED
JUL 13 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-42

RONALD CASSESSO,
LEWIS GRIECO,
PETER LIMONE,
JOSEPH SALVATI
AND
HENRY TAMELEO,
PETITIONERS,

v.

LARRY MEACHUM
AND
DOUGLAS VINZANT,
RESPONDENTS.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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RESPONDENTS.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Citations to Opinions Below.

The opinion of the United States Court of Appeals for the First Circuit is not yet reported.[1] Earlier opinions in this case

[1] The opinions of the Court of Appeals, the United States District Court and the Supreme Judicial Court and the judgment of the Court of Appeals are printed in the Appendix hereto.

are reported *sub nom. Commonwealth* v. *French*, 357 Mass. 356, 259 N.E. 2d 195 (1970), judgment vacated as to death penalty *sub nom. Limone* v. *Massachusetts*, 408 U.S. 936 (1972), and *sub nom. Commonwealth* v. *Cassesso*, 360 Mass. 570, 276 N.E. 2d 698 (1971), judgment vacated as to death penalty 408 U.S. 936 (1972).

Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit was entered on April 7, 1976. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The Circuit Justice extended until July 13, 1976, the time for filing this petition.

Questions Presented.

1. Was petitioner Peter Limone entitled to severance under the rule of *Bruton* v. *United States*, 391 U.S. 123 (1968), and, if so, was the refusal to grant such severance harmless error?

2. Were petitioners deprived of the basic constitutional right to be informed of the charges pending against them, and were petitioners further deprived of that right when the trial court admitted against them highly prejudicial evidence of virtually no probative value in the case on trial, which evidence tended to associate them with other crimes and with criminal organizations?

3. Were petitioner Ronald Cassesso and other petitioners deprived of their rights under the Fifth and Sixth Amendments when statements allegedly made by Mr. Cassesso after his

indictment and outside the presence of his counsel, who had already been retained, were admitted against him in evidence?

4. Were petitioners deprived of their right to cross-examine a prosecution witness on *voir dire*, and was petitioner Cassesso deprived of his Sixth Amendment right to cross-examine a key prosecution witness as to prior statements inconsistent with the testimony given by this witness at trial?

5. Were petitioners deprived of their liberty without due process of law when the prosecutor submitted and the trial court received a brief of which no copies were given to petitioners or their counsel and, if so, was such error harmless or waived?

6. Did the refusal of the trial court to allow petitioners to see the minutes of a prosecution witness before the grand jury deprive petitioners of due process of law after that witness admitted inconsistencies between his testimony to the grand jury and his testimony at trial?

7. Were petitioners deprived of a fair trial as a result of comments and conduct of the prosecutor and the court?

8. Were petitioners entitled as a matter of constitutional law in the circumstances of this case to an instruction that the testimony of an accomplice should be carefully scrutinized?

9. Did instructions given by the trial judge to the jury unfairly shift the burden of proof to petitioners on questions of alibi and conspiracy?

10. Was petitioner Henry Tameleo entitled under the Due Process Clause of the Fourteenth Amendment to rest at the close of the Commonwealth's case?

11. Were petitioners entitled to a new trial because of the suppression of exculpatory evidence and because of newly discovered evidence, and in view of their affidavits in support of their motion for a new trial in the state court were they entitled to either an evidentiary hearing on their motion or to have their affidavits taken as true for all further proceedings?

Statutory Provisions.

The Fifth Amendment to the Constitution of the United States is found at page XLVI of volume 1 of the United States Code (1958 Ed.):

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the Constitution of the United States is found at page XLVI of volume 1 of the United States Code (1958 Ed.):

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

Section 1 of the Fourteenth Amendment to the Constitution of the United States is found at page XLVII of volume 1 of the United States Code (1958 Ed.):

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Sections 40 and 79 (paragraphs "Accessory Before the Fact" and "Conspiracy") of chapter 277 of the General Laws of Massachusetts are set out at pages 3240-3241, 3248 and 3250 respectively of the Tercentenary Edition (1932) of the General Laws of Massachusetts, vol. II:

> "SECTION 40. The court may, upon arraignment of the defendant, or at any later stage of the proceedings, order the prosecution to file a statement of such particulars as may be necessary to give the defendant and the court reasonable knowledge of the nature and grounds of the crime charged, and if it has final jurisdiction of the crime, shall so order at the request of the defendant if the charge would not be otherwise fully, plainly, substantially and formally set out. If there is a material variance between the evidence and the bill of particulars, the court may order the bill of particulars to be amended, and may postpone the trial, which may be before the same or another jury, as the court may order. If, to prepare for

his defence, the defendant desires information as to the time and place of the alleged crime or the means by which it is alleged to have been committed, or more specific information as to the exact nature of the property described as money, or, if indicted for larceny, as to the crime which he is alleged to have committed, he may apply for a bill of particulars as aforesaid."

"SECTION 79. *Accessory before the fact* (under chap. 274, § 2) — Charge principal felony and proceed: That A. B., before the said felony was committed, did incite, procure, aid, counsel, hire or command the said (principal) the said felony to do and commit.

"*Conspiracy* — (1) That A. B. and C. D. conspired together to murder on E. F. (2) That A. B. and C. D. conspired together to commit rape upon E. F. (3) That A. B. and C. D. conspired together to steal the property, money, etc., of E. F."

Statement of the Case.

The judgment of the United States Court of Appeals for the First Circuit affirming judgments of the District Court dismissing petitions for writs of habeas corpus raises questions of whether five men, all incarcerated for life, were deprived of their federal constitutional rights before, during and after their trial in the Superior Court of the Commonwealth of Massachusetts. The case is voluminous, and not the least of the problems that it presents is that of dealing adequately and accurately with the procedural and substantive record without making it unmanageable, if not unreadable.

Petitioners were indicted by a grand jury of the County of Suffolk, Commonwealth of Massachusetts, on October 25, 1967, in indictments charging them as accessories before the fact or principals to the first degree murder of Edward Deegan, conspiracy to murder Deegan, and conspiracy to murder Anthony J. Stathopoulos. They were tried before a jury and found guilty on all three indictments. On the indictments charging conspiracy they were sentenced to consecutive prison terms, and on the indictments charging murder all, except petitioner Salvati, were sentenced to death. They appealed to the Supreme Judicial Court which, although finding at least fourteen errors made in the course of the trial, affirmed the judgments on May 4, 1970. *Commonwealth* v. *French*, 357 Mass. 356, 259 N.E. 2d 195. On May 5, 1970, petitioner Limone filed a request for rehearing, which on May 13, 1970, was denied.

Petitioners Limone and Cassesso filed timely petitions for writs of certiorari in this Court (No. 70-526). In the summer of 1970 petitioners also filed motions for new trial in the Superior Court of Massachusetts. Affidavits were attached to these motions. Petitioners requested an evidentiary hearing on the matters raised by the affidavits, but the court refused to hold one. It denied the motions, and two of the petitioners, Messrs. Limone and Cassesso, again appealed to the Supreme Judicial Court of Massachusetts. On December 8, 1971, the Supreme Judicial Court affirmed the judgments denying the motions for new trial. *Commonwealth* v. *Cassesso*, 360 Mass. 570, 276 N.E. 2d 698. A second petition for writ of certiorari was filed in this Court seeking to review the second judgment of the Supreme Judicial Court (No. 71-1139).

Although no question as to the constitutionality of the death penalty imposed upon four of petitioners had been raised in either the state court or in this Court in either proceeding, on June 28, 1972, this Court vacated both judgments in so far

as they left the death penalty undisturbed. *Limone* v. *Massachusetts*, 408 U.S. 936 (1972).

The present petitions were filed in the United States District Court for the District of Massachusetts in January of 1974. The various respondents filed motions to dismiss, which after hearing were denied. The judge declined to hold an evidentiary hearing on several of the matters as to which petitioners requested such a hearing but did hold an evidentiary hearing on the question of whether there had been improper submission of a brief *ex parte* to the trial judge. On July 10, 1965, he filed a memorandum and order devoted mainly to discussing this issue and dismissing the petitions. On appeal, the United States Court of Appeals for the First Circuit affirmed.

The two opinions of the Supreme Judicial Court, reported *sub nom. Commonwealth* v. *French*, 357 Mass. 356, 259 N.E. 2d 195 (1970), and *Commonwealth* v. *Cassesso*, 360 Mass. 570, 276 N.E. 2d 698 (1971), contain detailed statements of the evidence and the procedural history of the case. Although as petitioners pointed out in their several petitions for writs of habeas corpus, they do not necessarily accept the Supreme Judicial Court's characterizations of the evidence and the procedure, it would serve no point to state the evidence presented in the state courts or to give a detailed procedural history here.

This petition will be unavoidably long even without such a statement, and in several of the arguments it will be necessary to focus at length and in depth upon procedural and substantive problems.

Reasons for Granting This Writ.

Introduction.

This is the fourth time, the sixth if we count two previous petitions to this Court, that this case has come before a court sitting in a "reviewing" capacity. It thus seems strange that, given the gravity of this case, the flimsiness of the Commonwealth's evidence, the doubts that the Commonwealth's key witness has cast upon the veracity of his own testimony in the Superior Court by his subsequent affidavit, and the severity of the sentences, that many of the points which we are about to discuss in argument received only the most cursory review in the written opinions of the Supreme Judicial Court and the Court of Appeals and a few of the more important points have never been discussed in any judicial opinion.

Certain facts about this case are too plain not to be recognized even by the most avid partisan. This was a complicated case that took an exceedingly long time to hear and try. Numerous exceptions were taken before, during and after trial, and these in turn became the basis for lengthy assignments of error. An appellate opinion discussing both the arguments and the facts underlying each such assignment would have been, if we may be excused some hyperbole, of interminable length. In an age when judges have been rebuked for writing too much, it is hardly surprising that any judge would wish to sweep under the broad carpet of generalization the bits and pieces that appellate counsel wish to exhibit to judicial scrutiny.

Against this normal enough inclination must be weighed the requirements of law and justice. Whatever may be said at the trial level of our courts, where important decisions must often be made in, as it were, the twinkling of an eye, justice at the appellate level, we submit, must be more than an intuition

that a certain course of action was proper and right. At the close of his memorandum, the District Court Judge who heard this petition for writ of habeas corpus stated: "The petitioners certainly did not get a perfect trial, but they did get a fair one in constitutional terms." We do not doubt that the author of these words intended to convey the fact that he had considered all of the errors argued by petitioners in support of their petition for release on writ of habeas corpus and had concluded that they were without merit. Yet of the sixty-odd points argued by petitioners in their briefs, only two were discussed in the memorandum. One of these, the submission to the state trial judge by the prosecutor of an *ex parte* brief, received cursory treatment in an appendix to the opinion of the Supreme Judicial Court affirming the original judgments.

What cannot be explained in terms of all the facts often cannot be defended. Five men are serving sentences of imprisonment for life, having been convicted of a crime of which they are most conceivably innocent. It should not be asking too much of the appellate processes that the constitutional arguments which they now raise be given formal consideration.

I. Petitioner Peter Limone was Constitutionally Entitled to Severance under the Rule of Bruton v. United States, 391 U.S. 123 (1968).

Petitioner Limone argued in the Supreme Judicial Court and in the Court of Appeals that because statements of co-defendants Henry Tameleo and Ronald Cassesso (co-petitioners here), neither of whom testified at trial, were admitted into evidence and because these statements were incriminatory of petitioner, he was entitled to severance. This evidence was included in

the testimony of Joseph Baron. Baron testified in essence that Peter Limone had offered him a contract to kill Ted Deegan (357 Mass. at 363). Baron then allegedly went to Henry Tameleo to obtain Tameleo's "consent" to the killing (357 Mass. at 363-364). The following conversation thereupon allegedly ensued (Tr. 28, 3240-3241):

> "I [Baron] said to him that 'Peter [Limone] offered me a contract on Teddy Deegan, and that the office okayed it.' *He said, 'Yes, that's right.'* I said, 'Even though Peter said it was all right,' I said, 'I want you to okay it, I won't do it. Whatever you say I will do,' and he says, 'He definitely goes.' He says, 'No punk like Deegan is going to push the office around and cause trouble inside the Ebb Tide the way he has,' and that he was definitely involved in a $82,000 burglary in Carmen Puopolo's home.'" (Emphasis supplied.)

After this alleged meeting with Mr. Tameleo, Baron allegedly contacted petitioner Cassesso to enlist his assistance in carrying out the enterprise (357 Mass. at 364). Baron and Mr. Cassesso allegedly drove to Providence, and, in the course of the trip, according to Baron's testimony, the following conversation occurred:

> "I told him that the Deegan contract was an office matter and that Peter Limone was the one that offered it to me, and that it was okayed. He said to me that *when we were kids, Peter ratted on some guys and sent them to Shirley. He said, 'Do you trust him?'*" (Emphasis supplied.)

The Supreme Judicial Court offered four general reasons why *Bruton* should not apply to the exclusion of Tameleo's and Cassesso's alleged statements. We dispose of them in ascending order of complexity.

1. The court noted that four of the defendants at the joint trial testified (357 Mass. at 371-372). This, of course, is true but the only persons about whose alleged incriminatory statements petitioner complains are Messrs. Tameleo and Cassesso, who did *not* testify.

2. The court reasoned that the statements were as to Tameleo and Cassesso, the persons who allegedly made them to Baron, admissions rather than confessions (357 Mass. at 371). We assume, *arguendo*, that if Tameleo and Cassesso were asserting a Fifth Amendment right against self-incrimination (*cf. Escobedo* v. *Illinois*, 378 U.S. 478 (1964); *Miranda* v. *Arizona*, 384 U.S. 436 (1966)), this distinction might be plausible. In point of substance, however, it is petitioner Limone who is asserting a right to confront and to cross-examine Tameleo and Cassesso, whose statements, incriminatory of him, came into evidence as *their* admissions.

3. The Supreme Judicial Court observed that there were "conspiracy charges, as well as [a] substantive murder charge" against petitioner. It held, therefore that "[p]rinciples . . . governing the admissibility of evidence of statements of co-conspirators, to prove conspiracy and common criminal enterprises,[2] are thus applicable" (357 Mass. at 372).

[2] Respondent did not allege that petitioner Limone engaged in a "joint enterprise" with co-petitioner Cassesso and co-defendant Tameleo. Rather the theory was that each defendant "could be found to have conspired" with Baron (357 Mass. at 393, 373, fn. 15). Given full scope, respondent's evidence does not connect petitioner with Cassesso or Tameleo nearly as closely as the evidence connecting Evans and Bruton in *Bruton, supra*. See statement of facts in opinion of Eighth Circuit, 375 F. 2d 355, 359 (Bruton implicated as "accomplice"). Limone is never shown to have met with or even talked to co-petitioner Cassesso about the Deegan crime and the only allegation that he met with or talked to Tameleo was an inference drawn by the prosecutor in summation.

It should be a sufficient answer to this "distinction" that the crime of being an accessory to murder, for which petitioner is now under sentence of life imprisonment, is far more serious than conspiracy, for which he was sentenced to a total of three years' imprisonment. The trial judge having refused to sever the indictments, petitioner cannot through a joint trial be imprisoned for life without the opportunity to confront persons by whose statements he was incriminated, even if, *arguendo*, he could on the lesser offense be so deprived of his liberty for three years.

The argument that the accused in a conspiracy case need not be given an opportunity to cross-examine the statements of alleged co-conspirators incriminating him is particularly weak in Massachusetts; under Massachusetts law not only must the trial judge first decide that a conspiracy exists before the such statements can be submitted to the jury against all defendants (*Commonwealth* v. *Benesch*, 290 Mass. 125, 132-133, 194 N.E. 905 (1935); *Commonwealth* v. *Kiernan*, 348 Mass. 29, 57-58, 201 N.E. 2d 504 (1964)), but the jury also must be given an opportunity to redetermine the judge's finding and limit the statements if it disagrees therewith. *Commonwealth* v. *Rogers*, 181 Mass. 184, 191, 63 N.E. 421 (1902). Toomey, Some Procedural Aspects of the Prosecution of a Conspiracy in Massachusetts, 53 Mass. L.Q. 207, 241. If the accused is unable to cross-examine the person whose alleged statements incriminate him, how can he show the judge and the jury that the statements should not be admitted against him?

It is true that in *Dutton* v. *Evans*, 400 U.S. 74, 86 (1970), this Court declined to equate the Sixth Amendment's Confrontation Clause with the evidentiary hearsay rule and held constitutional a Georgia statute that stated: "After the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all." In part, the opinion may be

read as countenancing such an exception to *Bruton* on the basis of the overwhelming evidence against the respondent (the defendant in the state criminal case) and the "peripheral significance" of the one witness's testimony whose admission supposedly violated the Sixth Amendment. 400 U.S. at 87. So read, the opinion is a reassertion of the harmless error rule. *Chapman* v. *California*, 386 U.S. 18, 24 (1967).

But even if *Dutton* stands for a broader proposition that a defendant can be convicted on the basis of hearsay as long as the hearsay is admitted pursuant to a recognized, or at least a reasoned, exception to the hearsay rule, its holding can have no effect in this case in the absence of *any* evidence, except the evidence to which objection is made (and then only an inference from that evidence), that the alleged speaker (Mr. Tameleo) and the person whom he allegedly incriminated (Mr. Limone) had had any common dealings whatsoever. A contrary proposition would nullify *Bruton* outright.

4. We come now to the final ground upon which the Supreme Judicial Court held *Bruton* inapplicable. This was that the statements allegedly made by Tameleo "do not . . . very directly or clearly . . . charge [petitioner] . . . with complicity in Deegan's murder" (357 Mass. at 372). To the extent that the court was right, petitioner Limone's argument for severance was enhanced. As the article, The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions, Davenport, 85 Harv. L. Rev. 1378, 1402 (1972), states:

> "A declaration is inadmissible whenever it is either (1) materially ambiguous as to the meaning that would justify its admissibility or (2) ambiguous in a way that could be crucial or devastating."

Tameleo's alleged replies on their face may have incriminated petitioner Limone by showing that Tameleo (a) supposedly had prior independent knowledge of Mr. Limone's offer of a "contract," (b) recognized Mr. Limone's right to offer it and (c) identified Mr. Limone as part of the "office," a code word for an alleged criminal hierarchy. Baron also testified about a conversation he had with Tameleo regarding Mr. Limone's involvement in a contract to murder the witness Stathopoulos (Tr. 29, 3351-3352) and testified that even before the meeting at the Ebb Tide Tameleo knew about Mr. Limone's alleged plan to have Deegan murdered (Tr. 28, 3266).

While this may not be enough to show that petitioner was implicated by Tameleo's statement, the assistant district attorney in his summation to the jury expended considerable effort on this point. We quote his argument (Tr. 51, 7407-7408):

> "Now ladies and gentlemen . . . I said to you that after this conversation with Peter Limone in the North End, Joseph Baron went to see Henry Tameleo. Now, we know that he went there to see him to get an okay on this contract.
>
> . . . . . .
>
> "And what happened? Baron says, 'Peter offered me a contract on Teddy Deegan,' and listen to these words carefully. They were said a long time ago in this trial, and there's been a lot of evidence since then, and there's been a lot of interruptions and a lot of attempts to help you forget it, so I must repeat it for you, but I know some of you remember it. He said, 'Peter offered me a contract on Teddy Deegan, and that the office okayed it.' He said . . . 'referring to Henry Tameleo' . . . 'Yes, that's right.' 'Now, what do we get by the words, 'Yes, that's right?' Is it not safe to presume, using your common

sense, that the only way Henry Tameleo could have said, 'Yes, that's right,' was because he had spoken to Peter Limone and knew that this contract was going to come about? He admits that he knew something about it."

If it was permissible for the prosecutor to suggest the inference[3] which he suggested, we submit that petitioner was entitled to severance so that it could be shown through cross-examination of Tameleo that either Baron or Tameleo or both were in error.

It is significant that with regard to this fourth distinction the Supreme Judicial Court, unlike the Court of Appeals, sedulously avoids using the words "harmless error" or their equivalent. *Harrington* v. *California*, 395 U.S. 250, 254 (1969). The sole evidence that petitioner Limone ever offered Baron a contract was Baron's testimony to that effect, and the *sole* indication within that testimony of any knowledge *aliunde* that such a contract had been offered was the alleged conversation between Baron and Tameleo. And we submit, the Court of Appeals notwithstanding, uncorroborated testimony by Baron could hardly be considered "overwhelming" evidence on any point. *Patriarca* v. *United States*, 402 F. 2d 314, 319 (1st Cir. 1968).

We recognize that the rule of *Commonwealth* v. *French* on this point may no longer be the law of Massachusetts. See *Commonwealth* v. *LeBlanc*, 1973 Mass. Adv. Sh. 1091,

[3] In view of the prosecutor's statement to the court in his *ex parte* brief that Mr. Tameleo was the personal representative of the New England Cosa Nostra, and in view of the allegation that the "contract" to kill Deegan was an "office" contract, the prosecutor could hardly have believed that a visit from Mr. Limone to Mr. Tameleo was necessary to inform Mr. Tameleo of it or to obtain his approval.

1097-1098, 299 N.E. 2d 719 (1973); Note, Criminal Law — Confessions — Bruton Doctrine, 59 Mass. L.Q. 78, 79-80. Whether or not it is the law that Massachusetts courts currently follow, it cannot be squared with the Sixth Amendment for the very reason stated by Mr. Justice Kaplan in *LeBlanc*, *supra*, at 1098, 299 N.E. 2d at 723: "Indeed, there is danger that juries will make severe implications even from indefinite references, for association is all too easy with a defendant who is conspicuously present in court and who has already been in some way tied to the criminal episode."

Finally, the Supreme Judicial Court claimed that the alleged statement of co-petitioner Cassesso to Baron ("He said to me that when we were kids, Peter ratted on some guys and sent them to Shirley. He said, 'Do you trust him?'" — Tr. 3297) en route to Providence was not governed by *Bruton* because it implied "no charge [directly relating to] the Deegan murder" (357 Mass. at 373).[4] We do not understand, however, that the right to cross-examine is limited to situations in which one co-defendant who fails to testify directly implicates the other with respect to the crime with which they are charged. Petitioner's right to cross-examine a person who by innuendo allegedly accused him of associating with juvenile delinquents and of being generally untrustworthy is no less clear; indeed such testimony was so unnecessary to the Commonwealth's case that petitioner's right to cross-examine thereon should be even clearer.

Petitioner Limone submits that *Bruton* required severance and that the distinctions upon which the Supreme Judicial Court rested its decision range from the inapplicable (the fact that four co-defendants testified) to the inadequate (the supposed lack of clarity in the accusations) to the downright

[4] The Court of Appeals incorrectly described this conversation as one "which tended to link Limone to the decision to kill Deegan" (p. 3).

frivolous (against the makers, the statements were received as admissions rather than confessions).

The Court of Appeals seemed to view the testimony of Baron as to his conversations with petitioners Tameleo and Cassesso about petitioner Limone as admissible evidence because if "the trials had been severed, the very same statements could have been offered against him [Limone] at his separate trial, given a proper showing of conspiracy" (page 4). As to Cassesso's alleged statements about Limone's untrustworthiness, this proposition is almost certainly incorrect, for the statement would have been irrelevant. It is probably incorrect even as to petitioner Tameleo's statements, given its ambiguity. We repeat that no conspiracy between Tameleo and Limone or between Cassesso and Limone was ever shown. But in any event, if the statement had been offered at a separate trial, petitioner would have been entitled to summon Cassesso and Tameleo as witnesses and cross-examine them. *Washington* v. *Texas*, 388 U.S. 14, 22 (1967). *Commonwealth* v. *Baker*, 348 Mass. 60, 62-63, 201 N.E. 2d 829 (1964). He could not do so at a joint trial. See *Bruton*, *supra*, 128; *Baker*, *supra*, 62.

II. PETITIONERS WERE DEPRIVED OF THE RIGHT TO BE INFORMED OF THE CHARGES PENDING AGAINST THEM AND FURTHER DEPRIVED OF THAT RIGHT WHEN THE TRIAL COURT ADMITTED AGAINST THEM HIGHLY PREJUDICIAL EVIDENCE OF VIRTUALLY NO PROBATIVE VALUE IN THE CASE ON TRIAL, WHICH EVIDENCE TENDED TO ASSOCIATE THEM WITH OTHER CRIMES AND WITH CRIMINAL ORGANIZATIONS.

A. *Bill of Particulars (Not Applicable to Petitioner Grieco).*

The Sixth Amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right . . . to be

informed of the nature and cause of the accusation." The accused in a state court has the same right under the Fourteenth Amendment. *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948). We assume, *arguendo*, that petitioners have no specific right to be informed of the nature of the accusation through an indictment and that the right may be satisfied if the accused is furnished with particulars. *Commonwealth* v. *Jordan*, 207 Mass. 259, 267, 93 N.E. 809 (1911), affd. on other grounds, 225 U.S. 167 (1912).

In *United States* v. *Cruikshank*, 92 U.S. 542, 557-558 (1875), this Court said:

> "In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In *United States* v. *Mills*, 7 Pet. 142, this was construed to mean, that the indictment must set forth the offence 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;' and in *United States* v. *Cook*, 17 Wall. 174 [21 L. ed. 539], that 'every ingredient of which the offence is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species, — *it must descent to particulars.*'" (Emphasis supplied.)

All of the present petitioners, except Mr. Grieco, were indicted as accessories before the fact. How do their indictments, which the Supreme Judicial Court of Massachusetts

held adequate without particulars, square with what was said in *Cruikshank, supra*? After charging petitioners Grieco and Wilfred French as principals, the indictments go on to say that the other petitioners at an unknown place and at some time (a day, a month, a year, ten years?) before March 12, 1965, incited (from a soapbox, by nasty innuendoes?), or procured (through blandishments, by newspaper advertisement?), or aided (in any of a thousand possible ways), or counselled (voluntarily or upon request?), or hired (for how much?), or commanded (by what authority?), these two persons to kill Deegan. They do not allege a single specific act which these petitioners are alleged to have committed.

The right to particulars has been held constitutionally absolute, even in a jurisdiction where there was no statutory authority to grant them, where an "offense may be committed under [a] statute in several ways." *State ex rel. Wong Sun* v. *District Court*, 112 Mont. 153, 156, 157, 113 P. 2d 996 (1941). Moreover, we submit that if petitioners were to prepare a defense, they were entitled to know at least within reasonable limits the time of the alleged offense. *United States* v. *Glen Alden Coal Co.*, 4 F.R.D. 211, 213 (S.D. N.Y. 1943). *United States* v. *Macleod Bureau*, 6 F.R.D. 590, 593 (D. Mass. 1947). "Before March 12, 1965" is not a reasonable limit for the statement of the time within which the crime was allegedly committed.

In its brief in the Supreme Judicial Court, the Commonwealth virtually conceded that petitioner Cassesso was entitled to particulars but argued that his motion therefor was filed too late. We assume that the Supreme Judicial Court disposed of this point adversely to petitioners, or in any event passed upon the merits of the constitutional argument, when it said (357 Mass. at 400): "Although the motions were denied as having been filed late, the indictments were substantially in the statutory forms and were adequate." To dispose of any doubts

that may remain, however, we point out that Mass. G.L. c. 277, § 40, explicitly notes that particulars may be ordered "upon arraignment of the defendant, or at any later stage of the proceedings." Absent statutory authority, the court could not foreshorten a time allowed by statute for taking certain actions.

B. *Baron's Beliefs when he Testified Before the Grand Jury (Applicable to All Petitioners).*

Baron was allowed to testify as to his belief when he testified before a grand jury (Tr. 36, 4605). To say the least, these "beliefs" were prejudicial to petitioners. We quote the transcript (Tr. 36, 4605):

> "I believed that the office killed Tash — Arthur Bratsos, and Tommy DePrisco, my partners. I believed that the office took $70,000 off of their person which belonged to me for my bail. I believed that they plotted and tried to kill my wife and child. I believed that they tried to kill my brother. I believed that they tried to poison me in Charles Street Jail with my food, and they tried to kill me. And I believed that they stepped into my shylock business."

These beliefs were immaterial and irrelevant to the issue of Baron's "motive" to testify against petitioners, for which they were offered (Tr. 36, 4604). Petitioners were not charged with murdering Bratsos and DePrisco or attempting to murder Baron's family or Baron himself. That the witness believed that the "office" had mistreated him in no way detracts from his real motives for testifying, *i.e.*, what he had hoped to

achieve. If anything, the witness, if he believed these things, now had more motive than ever for lying in order to damage petitioners, since, according to his testimony, they were part of the "office."

But not only was Baron's testimony as to his belief irrelevant and immaterial; it was also rank hearsay. *Shepard* v. *United States*, 290 U.S. 96, 103 (1933). McCormick on Evidence, pp. 470-471. Neither Massachusetts (*Commonwealth* v. *DelValle*, 351 Mass. 489, 495, 221 N.E. 2d 922 (1966)) nor any other authorities recognize such testimony as this as an exception to the hearsay rule. In a recent case explaining *Dutton* v. *Evans*, *supra*, the Fifth Circuit held in *Hoover* v. *Beto*, 467 F. 2d 516, 532 (1972):

> "Under *Dutton*, the mission of the confrontation clause is to assure that the trier of fact is provided with a satisfactory basis for evaluating the truth of the evidence presented to it, whether the evidence is hearsay or non-hearsay and whether the satisfactory basis is provided by cross-examination or otherwise. The Sixth Amendment is violated where there is no satisfactory basis."

We submit that there was no satisfactory basis in this case to evaluate the truth of either Baron's belief, or, *a fortiori*, the truth of the proposition allegedly believed by him.

Petitioners concede it to be elementary law that a witness like Baron whose motives[5] are called into question may intro-

[5] We should at this point distinguish between a person's motives for doing a certain act, *e.g.*, need of money as a motive to rob, and his "motives" for lying on the witness stand. The former go to the essence of whether the person actually did the act in question and evidence relevant thereto can generally be introduced regardless of whether the person becomes a witness in the proceeding. The latter "motives" really represent a bias or hostility on the part of one who becomes a witness and go to the weight of his testimony. *Commonwealth* v. *Putnam*, 2 Allen, 301 (1861). In the case at bar, the Commonwealth without objection introduced voluminous evidence tending to show petitioners' alleged motives for wanting Deegan killed, but this evidence is not here in issue.

duce evidence to show the absence of a motive or, at least, of a motive likely to lead to mendacity. See Wigmore on Evidence, § 952, p. 510 (McNaughton Ed.). This doctrine has no application to Baron's testimony in the case at bar. Almost all of the cases of which we are aware arise in a context in which a defendant is shown to have testified in a certain fashion out of an evil or selfish motive and evidence is subsequently introduced in contradiction thereof. See, *e.g.*, *Commonwealth* v. *Giacomazza*, 311 Mass. 456, 469, 42 N.E. 2d 506 (1942). But a desire for personal revenge has never been considered a motive more likely to lead to credibility than the desire to escape punishment; on the contrary, whenever evidence of a desire for revenge has been introduced, it has been to destroy the witness's credibility. *Commonwealth* v. *Byron*, 14 Gray, 31 (1859). *Herlihy* v. *New York, New Haven & Hartford Railroad Co.*, 227 Mass. 168, 173, 116 N.E. 546 (1917), app. dis. 247 U.S. 526 (1918) (*dictum*).

Petitioners submit that there is no reported case in which a witness has ever been allowed, on the pretext of testifying as to his motives, to have offered his own uncorroborated opinions as to whether the defendants committed certain heinous acts, the commission of which is susceptible of logical and rational proof. Indeed, if such testimony were allowed, it would be extremely perilous for counsel ever to cross-examine a witness as to his self-interest in testifying in a certain fashion, for then, in any type of case, a witness so impeached could testify to his opinion that the accused was guilty of the most lurid and

revolting conduct imaginable, and offer that opinion as his motive for testifying. We do not understand that the law of Massachusetts countenances so absurd an anomaly to the rule prohibiting a witness from giving his opinion as to the state of the facts. *Commonwealth* v. *Ross*, 339 Mass. 428, 435, 159 N.E. 2d 330 (1959), and cases cited. The exception suggested by this case would soon swallow up the rule. As Wigmore, *op. cit.* pp. 511-512, notes:

> "When to a witness is imputed hostility to the opponent, the true process of explanation consists in showing that the facts offered do not really indicate the conclusion suggested, i.e. the hostility.[6] Thus, when the counter-evidence does not attempt to do this, but admits the hostility and desires to show that it was justifiable by the opponent's conduct, the offer is improper in two ways, first, because it does not at all explain away, but concedes that hostility exists, and secondly, because it tends to prejudice unfairly the cause of the opponent by showing him to be an unjust man. For these reasons such evidence may be excluded: 1852, Johnson, C.J., in *Cornelius* v. *State*, 12 Art. 801: 'A long and tedious detail by the witness of the numerous charges which he has heard against the accused could not aid the jury in the least possible degree in their deliberations, as they could not thereby ascertain the extent of his prejudice. . . . The question for the jury to determine is not what it is that constitutes the basis or foundation of the feeling or prejudice that may be entertained by the witness towards the accused; but on the contrary, it is as to the existence

[6]In this context, as the quotation from *Cornelius*, *infra*, indicates, Wigmore obviously uses "hostility" interchangeably with "prejudice." Fn. that of petitioners' counsel.

> of such prejudice. . . . In this case the effect of the re-examination was to disclose the defendant's general character, and that too by particular acts.'"

The Commonwealth's argument in the Supreme Judicial Court that testimony concerning the deaths of Bratsos and DePrisco was admissible had a curious inconsistency to it. On the one hand the Commonwealth conceded that there "was no suggestion that the defendants as individuals were responsible for the deaths of the persons named," whereas on the other hand it argued that "the deaths did tend to corroborate the testimony of Baron" as to motive (Bf., 72). If petitioners as individuals were not responsible for the deaths of Bratsos and DePrisco, what "motive" did Baron, on the basis of his own alleged beliefs, have to incriminate them?

Although this issue was the subject of a valid exception and assignment of error, was briefed in both the original and the reply briefs of petitioners and had been called to the Supreme Judicial Court's attention on request for rehearing, its opinion ignores it entirely. The opinion of the Court of Appeals, wherein the issue was also briefed, does likewise. But petitioners have nevertheless exhausted their state and federal remedies and cannot be precluded from raising the constitutional issues here. The introduction of evidence tending to make petitioners murderers of Bratsos and DePrisco, crimes with which they were not charged, was of no probative value and violated petitioners' Sixth Amendment right to be informed of the charges against them. *Cole* v. *Arkansas*, *supra*.

C. *The Cosa Nostra Question (Applicable Directly to Petitioner Limone and Indirectly to All Petitioners).*

On direct examination, petitioner testified that he frequented a club or "hangout" in the North End of Boston known as the Doghouse (Tr. 45, 6180). On cross-examination, the prosecutor asked Mr. Limone (Tr. 45, 6283):

> "Was it not true, sir, that in the year of 1965 the Doghouse was a meeting place for the Cosa Nostra?"

Petitioner answered in the negative before counsel had an opportunity to object. No proof was ever adduced that the Doghouse was anything other than what petitioner described.

Random House Dictionary of the English language (Unabridged Ed.), p. 329, defines "Cosa Nostra" as follows:

> "A secret organization engaged in organized crime in the United States modeled after and affiliated with the Mafia."

But no judge sitting in the year 1970 need consult a dictionary to arrive at a workable definition of Cosa Nostra. Though no one has proven that such an organization exists, though indeed its existence is doubted by many sophisticated law enforcement agencies, as the judge himself noted in this case, Cosa Nostra has become a synonym for "organized crime" (Tr. 45, 6317). It is of no substance that petitioner answered this question in the negative. No matter how the question was answered, the damage was done. By being called upon to answer the question at all, the witness was forced to admit (a) that the Cosa Nostra existed and (b) that he was, if not a

member, at least someone sufficiently familiar with it to know where it met. Petitioner had a right under the Sixth and Fourteenth Amendments to be informed of the nature of the accusation against him. After this question, Peter Limone was no longer on trial for being an accessory to the murder of Ted Deegan or for conspiring to kill Deegan and Stathopoulos. Rather, he was on trial for being part of "organized crime," for being an evil man with evil associates. It is not necessary to string out citations of cases to show that no such crime is known to our law. *Cf. Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939).

Curative instructions were sought (Tr. 45, 6315), but none were given. However, in this instance, curative instructions would probably have served only to emphasize the error, not to correct it. The error here, we submit, was of such magnitude that a mistrial (refused by the trial court) was the only realistic cure. *Krulewitch* v. *United States*, 336 U.S. 440, 453 (1949) (concurring opinion).

The Supreme Judicial Court observed that questions about the Doghouse "may have had relevance . . . in view of Baron's testimony about meeting Limone near that place" (357 Mass. at 401). Indulging the court in giving the widest possible scope to the doctrine of "relevance" (*cf. Ciucci* v. *Illinois*, 356 U.S. 571, 573 (1958)), we assume that questions about the Doghouse, in so far as they pertained to meetings between petitioner and Baron or any other meetings pertinent to the crimes on trial, could be asked and answered. But the question here in issue had no such pertinence. The Supreme Judicial Court also observed that the question was answered in the negative. Of course it was, but as we have already noted, by this time the damage was done. See *Douglas* v. *Alabama*, 380 U.S. 415, 419 (1965). In a different setting the Supreme Judicial Court has had no problem seeing how cross-examination of this type tends to "poison" a jury. As it said in *Com-*

monwealth v. *Homer*, 235 Mass. 526, 535-536, 127 N.E. 517 (1920):

> "The defendant's secretary and bookkeeper was examined by the district attorney as follows: 'Don't you know, Miss Montgomery, and didn't Mrs. Wilbur when you went out there to that hotel tell you, that the reason she sent for you was because the federal authorities were following her up to find out that Homer had been selling dope?' She replied in the negative, and although the defendant objected and excepted, the district attorney was again permitted to ask, 'Didn't she [Mrs. Wilbur] say some authorities were investigating the sale of dope by Homer?' Answer: 'No, sir.' And after other questions bearing on this matter had been put and answered, the question was asked, 'Did Mrs. Wilbur at any other time except those occasions about which we are now talking, your visits after Homer had left, say anything to you about being inquired of as to Homer's selling dope?' to which she answered, 'No, sir.' Further inquiries were made bearing on this subject. The attention of the witness was then directed to a message referred to in a telegram sent to the defendant at Chicago, and she was asked, 'Wasn't that message relating to the matter of the authorities being after Homer for selling dope?' This was objected to and the witness answered, 'No, sir.' There was no evidence whatever to support the intimations contained in these questions. What we have just said in discussing the previous exception applies with equal if not greater force to this question. It was an attempt by unfair means to belittle the prisoner and render him unworthy of respect or credit. We can conceive of no reason prompting these questions except the desire to discredit him. Even if the charge were true and the

> evidence was introduced to discredit the defendant as a witness by showing his conviction of a crime, this fact could be shown only by the record."

D. *The Loan-Sharking Question (Applicable to Petitioner Limone).*

On cross-examination petitioner Peter Limone was asked questions tending to show that he had engaged in loan-sharking. Any loan-sharking that petitioner may have engaged in involved "transactions irrelevant to the issue on trial." *Jones* v. *Commonwealth*, 327 Mass. 491, 494, 99 N.E. 2d 456 (1951). In truth, this line of questioning stands in naked violation of the principle set forth in *Commonwealth* v. *Stone*, 321 Mass. 471, 473, 73 N.E. 2d 896 (1947):

> "Fairness to a defendant in a criminal case requires the rule that the commission by him of an independent crime cannot ordinarily be shown as evidence tending to show the commission of the crime charged. . . . It does not follow that, because the defendant committed a similar offence on another occasion, he committed the crime for which he is being tried. And there is the danger that, because a defendant appears to be a bad man capable of, and likely to commit, such a crime as that charged, a jury might be led to dispense with proof beyond a reasonable doubt that he did actually commit the crime charged. Moreover, it is not fair that a defendant in the course of a trial should be called upon to defend himself against accusations not set forth in the indictment." (Citations omitted.)

The same rule applies to conduct that is, although not criminal, held in low esteem. *Commonwealth* v. *Homer*, *supra*, 535 (bankruptcy).

In the present case, the Supreme Judicial Court seemed to feel that the testimony was material on some theory of retaliation; whether petitioner was the same type as his lawyer described Baron to be (357 Mass. at 404). Petitioner is aware of no case holding that improper examination of one witness as to previous misconduct justifies the cross-examination of other witnesses to show that they had engaged in similar types of misconduct. The intimation of *American Woolen Co.* v. *Boston & Maine Railroad*, 190 Mass. 152, 156, 76 N.E. 658 (1906), is to the contrary. But even if there were such a doctrine, it would have no application here, where Baron's loan-sharking was brought out by the Commonwealth on direct examination (Tr. 28, 3217), giving petitioner a clear right to cross-examine him thereon.

E. *Questions About Limone's Friends (Applicable to Petitioner Limone).*

Over objection and exception the prosecutor was allowed to ask petitioner Peter Limone: "Tell me some of the other people that you hung around with there in the year of 1965" (Tr. 45, 6282). The seeming purpose was to permit the Commonwealth to show that the defendant was a friend of Gennaro Angiullo, "[then] recently acquitted [after a long murder] trial 'during which he had been portrayed in the Boston press as a leader of the underworld'" (357 Mass. at 401). This type of question is constitutionally offensive for two reasons. First of all, it attempts to show guilt by association. *Scales* v. *United States*, 367 U.S. 203, 224-225 (1961). Secondly, it attempts to impose an improper burden upon the

exercise of a basic constitutional right, freedom of, and privacy in, association. *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 270, 271 (1957); *National Association for the Advancement of Colored People* v. *Button*, 371 U.S. 415, 430-431 (1963). The names of petitioner's friends and associates bore no relevancy to any matter put in issue by the indictments. Petitioner was not charged with having notorious friends, if indeed such a charge could pass muster under the First Amendment.

F. *Questions About Petitioner Grieco's Domestic Difficulties (Applicable to Petitioner Grieco).*

During cross-examination of petitioner Grieco, the Commonwealth over objection and exception (Tr. 6551) was permitted to inject into the trial a series of allegations contained in a civil complaint brought against him in Florida by his wife. Mr. Grieco was asked whether his wife had alleged that he had been absent from home for periods of up to two or three months; had failed to notify her of his "whereabouts"; would become extremely angry and argue with her and shout at her and call her names; that she was in constant fear of personal injury and was in constant nervous apprehension; that his actions caused her to become physically ill, caused her to be unable to sleep, caused her to lose weight and rendered her unable to continue the marital relation (Tr. 6660). Compare *Douglas* v. *Alabama*, *supra*.

The Commonwealth argued that the evidence was admissible (1) with regard to "the timing of this man being in Florida," (2) "to impeach his credibility with regard to where he was living" and (3) to contradict petitioner's testimony that he was "in no trouble" while in Florida (Tr. 6652, 6653).

The Commonwealth's position was untenable. The witness, in his direct testimony, had admitted that in the month of January, 1965, he did have "domestic difficulties" (Tr. 6605). The Commonwealth introduced no evidence to show that the hearsay was material to the time petitioner was in Florida, when he returned to Boston, or in impeachment of where he was living while in Florida (Tr. 6652, 6653). Although the prosecutor promised this evidence was going to show that "this man was up to his ears in trouble" (Tr. 6652), the evidence failed to indicate that he was in any more trouble than he had previously admitted to when he testified that he had "domestic difficulties." The allegations contained in petitioner's wife's bill of complaint had no place in this murder trial.

The trial court also permitted cross-examination of Mr. Grieco concerning his knowledge of statements that his wife had allegedly made to the Florida police. Petitioner denied all such knowledge. Incorporated in questions, permitted by the trial judge over defense objections, were the prosecutor's suggestions that petitioner knew that his wife had "complained" to the Florida police that petitioner "had come into her house and put an extension cord around her neck and tried to kill her" (Tr. 6686) and knew that his wife "told the police at that time [he] took out a pistol from [his] jacket and . . . said, 'If you leave me, I will shoot you'" (Tr. 6686, 6687).

The Commonwealth persuaded the trial court that the evidence was being offered not for "the truth of the matter," but for petitioner's state of mind (Tr. 6685) and told the court that "at the right time" it would "offer the proper evidence" (Tr. 6686). At no time did the Commonwealth offer evidence from which the trial jury could infer that petitioner knew his wife made these statements to the Florida police. As a matter of fact, the Commonwealth introduced no evidence that the facts themselves were true.

Petitioners individually and collectively were not charged with killing anyone named Bratsos and DePrisco or with cruel and abusive treatment of Mrs. Grieco or with making illegal loans or with being part of criminal syndicates or with having notorious associates. They recognize that in a criminal case evidence that the accused committed an unrelated criminal offense is not excludable if the evidence has some probative value in the case on trial. *Commonwealth* v. *Chalifoux*, 362 Mass. 811, 815-816, 291 N.E. 2d 635 (1973), and cases cited. But here the evidence was virtually of no probative value and served only to inflame the jury against them. Under *Estelle* v. *Williams*, 96 S. Ct. 1691, 1692-1693 (1976), a trial tainted by such evidence does not result in a constitutional conviction. We cannot agree with the Court of Appeals that such rulings as these, cumulatively taken, "do not rise to constitutional dimensions" (Opinion, p. 8). The introduction of evidence "so irrelevant [and] so inflammatory" indeed raises a due process issue. *Moore* v. *Illinois*, 408 U.S. 786, 800 (1972).

III. Petitioner Cassesso's Rights under the Fifth and Sixth Amendments were Violated by the Admission of Incriminating Statements Elicited After he had been Indicted and had Retained Counsel — Massiah v. United States, 377 U.S. 201 (1964).

In view of the rulings of the Supreme Judicial Court and of the Court of Appeals on this point, we deem it advisable to restate the factual situation with regard to the events as to which Robert Glavin testified. Petitioner Cassesso was indicted for being an accessory on October 25, 1967, and on the same date for two conspiracies to commit murder (R. 375, 397). On November 17, 1967, an appearance was filed on Mr. Cassesso's behalf by counsel. Early in November,

1967, one Ventola allegedly approached Glavin about "copping out" (*i.e.*, falsely confessing) to the Deegan murder (Tr. 40, 5388). Ventola offered Glavin cash (to be held in escrow) and other emoluments in return. Glavin then reported his conversations with Ventola to the F.B.I. agent Hanlon, who told him to speak to *petitioner Cassesso* as if he were ready to cooperate in the "cop-out" (Tr. 41, 5415, 5437). It was Glavin who approached Mr. Cassesso, not *vice versa* as suggested in the opinion of the District Court (Tr. 5415, 5437). Contrary to the statement in the opinion of the District Court, Glavin spoke to Mr. Hanlon before he spoke with petitioner (Tr. 5436-5437). Thereafter, in December, 1967, Glavin contacted and spoke with petitioner in prison, holding three conversations with him at all (Tr. 41, 5564-5582). In the course of these conversations, petitioner allegedly repeated Ventola's offers, embroidering and conditioning them with the passage of time. It is undisputed that in December, 1967, and thereafter, counsel was unaware of these conversations between petitioner and Glavin, who was permitted to testify at trial about his conversations with petitioner. Petitioner argued that this testimony ought not to have been received under the plain holding of *Massiah*, and both the Supreme Judicial Court and the Court of Appeals offered several reasons why *Massiah* should not apply.

The Supreme Judicial Court was obviously correct in holding that the Commonwealth could take "reasonable efforts to protect the public interest and an individual from a new crime" (357 Mass. at 387). Such efforts could include counselling Glavin to refuse Ventola's offer or, if necessary, moving Glavin or Ventola to a new place of confinement. We assume even further, for the sake of argument, that if petitioner's alleged conversations with Glavin constituted a separate crime, respondent could introduce the conversations at the trial of petitioner for that crime. See *Hoffa* v. *United States*, 385

U.S. 293, 307-309 (1966); *United States* v. *Missler*, 414 F. 2d 1293, 1302-1303 (4th Cir. 1969). But here the evidence in question was received solely as an admission against interest to show consciousness of guilt. *Commonwealth* v. *Wallace*, 123 Mass. 400 (1877). This admission had been elicited by Glavin upon express orders from an F.B.I. agent. Why and how there can be any distinction for *Massiah* purposes between an admission of direct guilt and an admission that shows mere consciousness of guilt, no court has yet even tried, much less been able, to explain. The rights which *Massiah* seeks to uphold, the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel, are surely as applicable to one type of admission as to the other.

The opinion of the Court of Appeals dealing with the *Massiah* issue (pages 4-8) has a curiously inconsistent and unsettled ring to it. First, the court asks whether *Massiah* should not be distinguished because, in the case at bar, the person who caused the elicitation of the incriminating statements, F.B.I. agent Hanlon, did not work for the government of the Commonwealth, which of course had indicted petitioner. We submit that to allow this distinction to stand would effectively nullify *Massiah* by reviving the old and now thoroughly discredited "silver platter" doctrine. *Elkins* v. *United States*, 364 U.S. 206, 223 (1960). The suggestion of the Court of Appeals that Hanlon or Glavin or both may not have known the crime for which petitioner was under indictment is without foundation. For one thing, upon Glavin's own testimony Ventola had already told him about the crime, and Glavin had essentially told agent Hanlon what Ventola had said to him. Moreover, as agent Hanlon had been active in pre-trial investigations of cases somewhat related to this (see *Patriarca* v. *United States*, 402 F. 2d 314 (1st Cir. 1968)), it is exceedingly unlikely that he was unaware that petitioner was under indictment for the murder of Ted Deegan. In any

event, where the question of right to counsel is raised, and where petitioner has made a *prima facie* showing that such rights were violated, the burden, we submit, was on the government to show lack of knowledge of the indictment. See *Carnley* v. *Cochran*, 369 U.S. 506, 514-515 (1962).

The opinion of the Court of Appeals next suggests that *Massiah* may be inapplicable because in the case at bar the investigation involved a new and separate crime, subornation of perjury. There is, to begin with, considerable doubt about the correctness of the underlying proposition. On what Ventola had allegedly told Glavin at the time Glavin approached agent Hanlon, Ventola probably could have been indicted for subornation of perjury. That, of course, is entirely a state crime which would have been prosecuted in the state courts. On the other hand, and this we cannot emphasize enough (*cf.* fn. 1, page 5, of the opinion of the Court of Appeals), when Glavin went to see Hanlon and was told by Hanlon to interview petitioner, he had never had any conversations with petitioner at all. Thereafter it was Glavin who sought out petitioner and not petitioner who sought out Glavin (Tr. 5439). There was, therefore, no crime to investigate until Glavin, acting on the specific recommendation of agent Hanlon, talked to petitioner.

Moreover, although both the Supreme Judicial Court and the Court of Appeals refer to "good faith" investigations by the government, there was no evidence of such "good faith" and indeed there is considerable reason to doubt it. Where subornation of perjury is entirely a state crime, why was the F.B.I. involved in investigating it at all? Was it merely in the hope that, given the weakness of the Commonwealth's case at petitioner's trial for the murder of Deegan, an elicitation of an admission against interest from one of the defendants by a federal officer might render the statements admissible at trial? The Court of Appeals assumed that the government's intention

was not "to obtain testimony against Cassesso for use at the trial for Deegan's murder" (p. 7). But there is absolutely nothing in the court's opinion or in the record to support such a finding. In this respect, this case is totally different from that of *Hoffa* v. *United States*, *supra*, where the informer-witness, Partlin, found out about the alleged crime when he penetrated defendant's quarters and counsel but apparently played no part in causing it to be committed or in committing it.

Finally, the Court of Appeals recognized that in both *Hoffa* v. *United States*, *supra*, 308, and *United States* v. *Missler*, *supra*, 1302-1303, it was indicated that while evidence obtained in violation of *Massiah* and showing commission of a separate crime might be usable in the trial of that crime it was not usable in a trial of the crime for which the accused was already under indictment when the *Massiah* violation occurred. The Court of Appeals, however, seemed to view this distinction as insubstantial. We submit that it is not. The purpose of the distinction is prophylactic; the knowledge that admissions against interest elicited after the accused has been indicted and his counsel has been retained cannot be used at the trial serves as a deterrent from the elicitation of such statements since not only will they be excluded at trial but also, under the fruit of the poisonous tree doctrine (*Nardone* v. *United States*, 308 U.S. 338, 341 (1939)), evidence indirectly obtained as a result of such an elicitation may also be excluded.

IV. Petitioners were Deprived of the Right to Present Evidence and Cross-Examine Properly and Effectively the Commonwealth's Witnesses.

A. *Examination on Voir Dire.*

Since Glavin (see argument III, *ante*) testified as to certain admissions of petitioner Cassesso, the judge quite properly held

a voir dire to determine their admissibility (Tr. 40, 5406). *Jackson* v. *Denno*, 378 U.S. 368, 378-385 (1964). On the theory that Glavin's testimony was admissible only against Cassesso, the court denied other counsel the opportunity to cross-examine Glavin on voir dire (Tr. 40, 5469). The Supreme Judicial Court upheld the trial judge, finding no abuse of discretion (357 Mass. at 402). We suggest that, from a Sixth Amendment standpoint, the Supreme Judicial Court is clearly in error.

"[T]o deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law." *Pointer* v. *Texas*, 380 U.S. 400, 405 (1965), and cases cited. "'[A] denial of cross-examination without waiver . . . would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' *Brookhart* v. *Janis*, 384 U.S. 1, 3." *Smith* v. *Illinois*, 390 U.S. 129, 131 (1968).

The sole question is whether other petitioners had any cognizable interest in persuading the judge to exclude Glavin's testimony. Rather obviously they did. Petitioners and Cassesso were charged with two conspiracies. To begin with, the judge charged the jury that "anything that any member of the conspiracy does or says in furtherance of the conspiracy binds all of them, all of them" (Tr. 51, 7481). Secondly, despite the severe limitations which the judge placed on the cross-examination of Glavin by petitioner Cassesso's counsel (see Argument IV, B) after he ruled the testimony admissible the jury could not fail to infer that Mr. Cassesso would have had aid from friends with the alleged "cop-out" plan. Who were these friends more likely to be (in the minds of the jurors) then those who, like the other petitioners, were supposed to have had the greatest interest in Glavin's cop-out?

B. *Cross-Examination of Glavin.*

We come now to what may well be the most grievous single evidentiary error committed by the trial judge in the course of this trial. The defendant's right in Massachusetts to cross-examine a witness on prior inconsistent statements made to the grand jury is settled. *Commonwealth* v. *Homer, supra,* 532-533. The right to impeach a witness by showing prior inconsistent statements is elementary. *United States* v. *Hannon*, 105 F. 2d 390, 391 (3d Cir. 1939), cert. den. 308 U.S. 594 (1939). In the trial of a criminal case, it is constitutionally guaranteed.

Petitioner Cassesso tried to show in cross-examination of Glavin that Glavin, while under oath before a grand jury (not the grand jury that returned these indictments), gave testimony substantially conflicting with the testimony he gave on direct examination at petitioner's trial. On direct examination, Glavin testified that petitioner told him (Glavin) that he (petitioner) had checked Glavin out, that he (petitioner) would pay Glavin $50,000 for the cop-out, and that he (petitioner) would arrange parole or commutation for Glavin. Before the grand jury, Glavin had testified that "the office" would do these things. The use of the grand jury testimony on cross-examination would have served two purposes: first, that of impeaching Glavin generally by showing prior inconsistent statements, and, secondly, that of undermining Glavin's specific testimony at the trial by (hopefully) getting him to adopt his earlier statements over his direct testimony. The opinion of the Supreme Judicial Court and that of the Court of Appeals misstate the issue.[7] Petitioner Cassesso did not

[7] "Cassesso's counsel had obtained from another Superior Court judge Glavin's testimony before a Norfolk County grand jury in connection with indictments of Cassesso and others for attempting to get Glavin to commit

contend before the Supreme Judicial Court that he should have been allowed to introduce the grand jury minutes into evidence without proving them in due course (Opinion of Court of Appeals, pp. 8-9). His arguments rather were and are that the judge erred in refusing (a) to allow petitioner to ask Glavin whether he had made specific prior inconsistent statements to the grand jury (Tr. 41, 5652-5661; 5682-5683) and (b) to allow petitioner to ask Glavin whether he had not at another time (without reference to the grand jury) stated that someone other than petitioner (*viz.*, the office) had "checked him out" and was going to furnish money and other consideration that were to be Glavin's reward for "copping out" (Tr. 41, 5571, 5598, 5608, 5624-5625, 5655, 5657, 5659; 42, 5734).

As to the former point, Massachusetts law has never required that a party desiring to show on cross-examination a prior inconsistent statement under oath by the same witness even produce a transcript, much less a duly proven transcript, of the proceedings at which the inconsistent statement was made. *D & P Equipment Corp.* v. *White Spot Construction Corp.*, 355 Mass. 787, 788, 243 N.E. 2d 922 (1969). If we assume that Massachusetts could constitutionally impose such a requirement at all, it could not nevertheless impose it suddenly and without warning for purposes of this case. *National Association for the Advancement of Colored People* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 456-457 (1958).

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perjury. Cassesso's counsel was permitted on various occasions to use these minutes (marked for identification) to refresh Glavin's recollection. He was not allowed to use the minutes themselves to show Glavin's prior inconsistent statements, unless and until he proved the minutes in usual course. The judge permitted wide questioning about the prior statements. Cassesso's counsel did not make an attempt to prove, through the stenographer or otherwise, any prior inconsistent statements before the grand jury. He cannot now complain." (357 Mass. at 402.)

As to the latter point, that Glavin had earlier said that the "office" was going to pay for the "cop-out," obtain a reduction in Glavin's sentence, and do other things for Glavin — this was not a collateral issue. Glavin's testimony, as already noted, had been admitted on the consciousness-of-guilt-theory. If Mr. Cassesso had said that he himself would get Glavin's sentence reduced after Glavin "copped out," it would have been absurd, for here was Mr. Cassesso on trial for his life. If he had said that someone else would do it, exploration of the question of "who?" might well have shown that the conversation never took place. In any event, the Commonwealth having fully opened up this subject on direct examination (Tr. 41, 5567), it is elementary that petitioner had the right to cross-examine thereon. *Wills* v. *Russell*, 100 U.S. 621, 625 (1879).

The Supreme Judicial Court, although stating that it saw no need for the judge to have denied petitioner the right to ask Glavin questions which in answer would have involved the word "office," saw no prejudice to petitioner (357 Mass. at 380). We submit that for the reasons already stated the Supreme Judicial Court was wrong about lack of prejudice but reiterate that "no amount of showing of want of prejudice would cure" the error in denying petitioner the right to cross-examine. *Smith* v. *Illinois*, *supra*. Parenthetically, we are led to remark that, though the rulings here in question would have been no less erroneous, it would have been commendable had the same attitude carried over to the questions and remarks of the prosecutor and of respondent's witnesses. In fact, however, the prosecutor and his witnesses, particularly Baron, were allowed to refer to the "office" almost, as it were, in every other breath. Early in the trial the judge said (Tr. 29, 3285): "I think any connection with 'the office' [a code word for the underworld at least at this trial] has something to do with this case." We fear it would be mistaken to

imagine that solicitude for the rights of other petitioners prompted the judge to deny petitioner Cassesso his Sixth Amendment right of confrontation.

V. There was No Acquiescence by Counsel or by Petitioners in the Submission of an Ex Parte Brief by the Prosecutor to the Judge; the Supreme Judicial Court having Considered Petitioners' Argument on this Point, it was Properly Before the District Court on Petition for Writ of Habeas Corpus. The Submission of Such a Brief Deprived Petitioners of Due Process of Law.

In the course of trial petitioners learned from an off-hand remark by the prosecutor to the trial judge that the Commonwealth had been submitting briefs. Several attorneys then complained about not being served with copies of such briefs. The failure to give counsel copies of briefs was assigned as error in the original appeal to the Supreme Judicial Court, and the assignment was briefed.

The opinion of the Supreme Judicial Court states (357 Mass. at 403):

> "There was no error in the reception by the judge from the district attorney of a memorandum (not furnished to the defendants or received in evidence or marked for identification) apparently concerning questions of evidence likely to arise during trial. This procedure apparently arose out of a suggestion during a conference at which defence counsel were present. No objection to the suggestion was voiced by any counsel."

The statement "There was no error . . . " can mean only that the Supreme Judicial Court considered this assignment

and found that the practice of submitting an *ex parte* brief was not error. That the Supreme Judicial Court may have believed this practice to have arisen out of a suggestion during a conference and that no objection to the suggestion was voiced by any counsel does not detract from the fact that the court passed upon the error nevertheless.[8] The passing upon this assignment by the Supreme Judicial Court sweeps aside all questions of waiver for purposes of federal habeas corpus. The true rule, we submit, is analogous to the rule that this Court applies in determining whether to pass upon federal questions raised on review of decisions of state courts: "There can be no question as to the proper presentation of a federal claim where the highest state court passes on it." *Raley* v. *Ohio*, 360 U.S. 423, 436 (1959). Indeed, the rule should be even less strict in habeas corpus cases than on petitions for writ of certiorari and appeals from state courts to the Supreme Court of the United States since in those cases the failure to raise federal questions in the state courts affects the jurisdiction of this Court. *Cf. Bowen* v. *Johnston*, 306 U.S. 19, 27 (1939). In *Lefkowitz* v. *Newsome*, 420 U.S. 283, 289-292 (1975), this Court held that where state law permitted a federal constitutional question to be litigated in the state courts at a time when the state might have foreclosed it (after a plea of guilty), the same question could be litigated in the federal courts on petition for writ of habeas corpus.

Moreover, even if petitioners' counsel at their Superior Court trial had made a conscious decision to waive the federal question with respect to the submission of briefs, that waiver would not be binding upon petitioners absent a showing that they acquiesced in it. This Court stated in *Humphrey* v.

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[8] Indeed, there was ***absolutely nothing*** in the record before the Supreme Judicial Court to have supported such a finding.

Cady, 405 U.S. 504, 517 (1972): "But such a waiver must be the product of an understanding and knowing decision by the petitioner himself, who is not necessarily bound by the decision or default of his counsel." It is impossible to accept the view that petitioners knowingly waived their objections to the submission of an *ex parte* brief when that decision was apparently made during a lobby conference.

But we go further and submit that the finding of waiver apparently affirmed by the Court of Appeals (Opinion, p. 9) itself cannot stand. The memorandum of the District Court states:

> "At the hearing before me, Mr. Zalkind, who had been the Assistant District Attorney prosecuting the case, testified that at the start of each trial day, he would submit a two or three page brief outlining the testimony that he expected to offer during the day, with a brief exposition of the legal and evidentiary questions that he anticipated this testimony would generate. He did not give copies to any defense counsel. He testified that before the trial began, at an unrecorded lobby conference, the judge and all counsel agreed to a plan under which counsel for both prosecution and defense could submit trial briefs to the court without giving copies to the other side. The reason for this was supposed to have been the extreme security surrounding the trial, and the desire of all parties to keep the court informed without tipping their hands to the opposition.
>
> "He further testified that defense counsel knew about his submission of trial briefs, because he submitted them to the clerk in open court in plain sight. He testified further that one or more of the defense attorneys had asked for copies on these occasions, but that he had refused to give them.

> "Mr. Zalkind testified that he had searched both the files of the District Attorney and his personal files for copies of these trial briefs, but he found none. He did find a carbon copy of what appears to be a fifteen-page trial brief. Mr. Zalkind says that this is not a copy of anything which he submitted, but is the equivalent of a compendium of the briefs which he did submit over a period of several days and is typical in form and content of those he did submit.
>
> "All of the surviving defense counsel, Messrs. O'Donnell, Balliro, Chisholm, Stanziani and Paris testified that they had no memory of any such lobby conference as was described by Mr. Zalkind. They testified that they had no knowledge of the submission of briefs by Mr. Zalkind, and that they never would have consented to the submission of briefs by the prosecutor without copies being furnished to them. Mr. Balliro testified that he learned about the trial briefs late in the trial and was 'outraged.'

Why would experienced trial counsel possibly want to waive their right to see the brief that the assistant district attorney was submitting to the judge? This rather basic question Judge Skinner's memorandum does not answer. It merely states, paraphrasing the assistant district attorney's testimony at the habeas corpus hearing, that the reason for this unusual procedure "was supposed to have been the extreme security surrounding the trial, and the desire of all parties to keep the court informed without tipping their hands to the opposition."

This reasoning will not stand up under the strain of analysis. Counsel for petitioners were certainly not responsible for any of the security surrounding the trial and indeed they objected to it constantly. It may be that the trial judge and the assistant district attorney felt that there would be a breach of security if copies of briefs were submitted to defense counsel, but it is exceedingly doubtful that defense counsel would have shared that belief. Indeed, if one examines the brief that the assistant district attorney *may* have submitted to the trial judge (the prosecutor on examination before Judge Skinner did not know whether the brief submitted at the hearing of this petition was actually a copy of all that had been submitted to the Superior Court), one sees nothing in it that would impair any security measures that may have been taken by the Commonwealth with respect to the trial. As for "tipping their hands," none of the defense counsel ever submitted a brief to the trial court, and thus they had no hands to tip. Even if they had submitted such briefs or had intended to, no one experienced in the defense of criminal cases would be willing to trade the opportunity to have the prosecution's brief in advance of trial (or while the prosecution is putting in its case) for the right to keep his own brief out of the hands of the prosecution. It should be noted that the affirmative defense put on by each of petitioners at the trial was short and relatively straightforward, and unlikely to raise any questions of law concerning which briefs would be necessary. Petitioner Tameleo put on no defense at all. Argument X, *post*.

Judge Skinner stated that a certain colloquy occurring on the twenty-sixth day of trial "lends support to Mr. Zalkind's testimony" that counsel was aware of the submission of a brief. We submit that it does not. If counsel had agreed that briefs could be submitted *ex parte*, it would have been sense-

less for them to complain about such submission in the middle of the trial. But they did complain in the plainest terms. And did the trial judge or the district attorney then "remind" them that they had agreed to this proceeding at a conference before trial had begun? Quite the contrary; all that the judge did was to inform counsel that they too could submit *ex parte* briefs if they wished to do so. Counsel did not even accept the invitation, and it is unnecessary to consider what the posture of this case would be if they had done so. This Court, on review of the record, will, we submit, find neither waiver nor acquiescence, much less a deliberate by-passing of state remedies. *Cf. Fay* v. *Noia*, 372 U.S. 391, 439 (1963).

We pass from the procedural to the substantive considerations of this point. We cannot agree with the statements in the memorandum of the District Court and in the opinion of the Court of Appeals (p. 10) that there was little in the brief that went beyond the opening. Not only do statements in the alleged copy go far beyond anything stated in the opening; they indeed go much farther than any facts proven by the Commonwealth at petitioners' trial or even provable at such a trial. Specifically, there was no offer to prove in the opening and no evidence at the trial that Teddy Deegan was maintaining caution due to the murder of his close friends Mannen and Delaney, that petitioner Grieco ever agreed that "he would engage Roy French to 'set up' Deegan if he could be included in a 'piece of the action'," that on January 10, 1965, Baron learned from French that Deegan and Stathopoulos planned to rob a loan company in Chelsea, that Baron's agreement to kill Stathopoulos was contingent upon petitioner Tameleo's approval, or that Baron after March 10, 1965, enlisted the aid of petitioner Cassesso in the alleged plot to kill Deegan. Indeed, according to Baron's testimony, prior to March 10, 1965, he drove to Providence with petitioner Cassesso and there enlisted

his aid, having previously discussed the matter with him in Florida in February.

But we save for last some of the assertions made in this brief that are startling, not only because they were neither mentioned in the opening nor proven by any evidence but more so because they should never have been mentioned at all to the trial judge, let alone mentioned *ex parte*. We specifically refer to the assertions that petitioner Tameleo was the personal representative of the head of the New England Cosa Nostra, that petitioner Grieco had asked Baron to help kill his (Grieco's) wife, and that Grieco had been told by Baron that if he cooperated some of the other petitioners might kill Mrs. Grieco. If ever the accused in a criminal case was prejudiced by an *ex parte* communication to a trial judge about him, surely this was the case.

Lord Cottenham once uttered an important truth: "Every private communication to a Judge, for the purpose of influencing his decision upon a matter publicly before him, always is, and ought to be, reprobated; it is a course calculated, if tolerated, to divert the course of justice, and is considered, and ought more frequently than it is, to be treated as, what it really is, a high contempt of Court." *Matter of Dyce Sombre*, 1 Mac. & G. 116, 122 (1849). See *Smith* v. *United States*, 360 U.S. 1, 17-18 (1959) (separate opinion); *McFadden* v. *United States*, 63 F. 2d 111, 112 (7th Cir. 1933).

It would have been serious enough, certainly serious enough to require the issuance of a writ of habeas corpus, if the Commonwealth's brief to the Superior Court had done no more than outline questions of law likely to arise at the trial and give reasons in law why these questions should be decided in a certain manner. Due process of law, if it encompasses nothing else, at the very least encompasses the right of a person accused of a crime to know what issues are being presented to the presiding judge and what reasons are being given

to the presiding judge to decide these issues one way or another. The right to be heard is central to due process even in a civil action. In a criminal case the right is absolute. *Moore* v. *Dempsey*, 261 U.S. 86 (1923). And there is "no hearing in the constitutional sense where the party . . . is not given an opportunity to test, explain or refute." 16 Am. Jur. 2d § 279, page 985. *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Co.*, 227 U.S. 88, 93 (1913). *Morgan* v. *United States*, 304 U.S. 1, 18 (1938).

Nor is it significant that the case was tried to a jury that did not see the brief. The Commonwealth's brief went far beyond outlining questions of law and rather deeply into questions that the Commonwealth regarded as addressed to the judge's discretion. In the instant case the judge decided almost every question of discretion against petitioners. And as the opinions of the Supreme Judicial Court in this case indicate, decisions by a trial judge on questions of discretion are rarely if ever reversed on appeal in criminal cases in Massachusetts. *Commonwealth* v. *Phelps*, 210 Mass. 109, 114, 95 N.E. 868 (1911). Yet it has also been said that "discretion" is something more than judicial power to run amuck. In *Davis* v. *Boston Elevated Railway*, 235 Mass. 482, 496-497, 126 N.E. 841 (1920), the Supreme Judicial Court speaking through Chief Justice Rugg said:

> "It commonly and rightly is said that such a motion is addressed to the discretion of the court. By such expression is implied absence of arbitrary determination, capricious disposition, or whimsical thinking. An exhibition of ungoverned will, or a manifestation of unbridled power is not the use of discretion. The word imports the exercise of discriminating judgment within the bounds of reason. Discretion in this connection means a sound judicial discretion, enlightened by intelligence and learning,

controlled by sound principles of law, of firm courage combined with the calmness of a cool mind, free from partiality, not swayed by sympathy nor warped by prejudice nor moved by any kind of influence save alone the overwhelming passion to do that which is just."

It follows that even if a judge were (subjunctive intended) permitted to receive a brief served on him *ex parte* dealing with pure questions of law, he should not and could not consistently with the Constitution accept a brief dealing with questions of discretion since, at least in Massachusetts, discretion means informed discretion and may be based upon the judge's view of the facts as well as his view of the law.

The alleged brief of the Commonwealth to the trial judge suggested that the judge exercise discretion to deny a motion for a directed verdict at the close of the opening statement (page 5), to allow the jury to view photographs of the body of the deceased (page 7), to refuse to give an instruction that uncorroborated testimony of an accomplice should be weighed with great scrutiny (page 7), and to allow Baron to testify on redirect examination as to his real motive for becoming a Commonwealth witness (pages 11-14). On the latter point he is asked to exercise the same discretion with respect to motives of the witness Stathopoulos (page 14). It is significant that all of these issues except for that of a directed verdict on the opening statement are bases upon which petitioners now seek relief by habeas corpus. The issue of allowing a witness to testify that alleged hostility to or bias against the accused is justified by the accused's conduct is discussed at length in argument II, B, of this petition. It is interesting to note that not one of the cases cited in the Commonwealth's alleged memorandum to the Superior Court stands for the proposition that a witness may show that bias or hostility against an

opponent is justified by the opponent's previous conduct, let alone by the witness' belief as to the opponent's previous conduct. It is at least plausible that if the Commonwealth's brief had been submitted to petitioners' attorneys at their trial in the Superior Court, they would have been able to show the judge that the line of cases relied on by the Commonwealth was inapposite and that the true rule was that stated in *Wigmore* and discussed in argument II, B, *ante*.

But the brief allegedly submitted by the Commonwealth to the Superior Court went far beyond outlining the facts that the Commonwealth hoped to establish and the rulings of law that the judge should make on questions that the Commonwealth thought might arise at trial. It is, as already noted, replete with gross calumnies. Petitioner Tameleo is described as the personal representative of the New England head of the Cosa Nostra. Petitioner Grieco is described as a man seeking to have his wife killed by a paid murderer. The other petitioners are described as men who would help murder Grieco's wife in return for his cooperation in the plan to kill Deegan. These matters were totally extraneous to the trial. If the Commonwealth had reason to believe that Mr. Grieco had attempted to hire someone to kill his wife, it should have sought an indictment against him on this charge. Even then, the information was totally immaterial, and the trial judge should not have been apprised of it. It is not true, as the opinion of the Court of Appeals suggests (p. 10), that the judge was not the "trier of fact." In the course of trial he made several findings, not the least of which the existence of a conspiracy (357 Mass. at 379-380) and the admissibility of Glavin's testimony (357 Mass. at 384-385). See also argument VI, B, *post*.

The Fourteenth Amendment to the Constitution of the United States guarantees the petitioners a right to a trial before an impartial judge. *In re Murchison*, 349 U.S. 133,

136 (1955). A judge is not unbiased or impartial when he has received *ex parte* information about a defendant that is damaging and derogatory to his personal reputation. *United States* v. *Womack*, 454 F. 2d 1337, 1341 (5th Cir. 1972). The opinion of the Court of Appeals (p. 9) concedes "that *ex parte* communications shadow the impartiality . . . of any judicial proceeding." Having conceded this, the court was, we submit, wrong in ruling that such communications are "not a per se violation of petitioners' due process rights." Like the right to counsel, the right to an impartial judge is absolute. A note in the Harvard Law Review, Harmless Constitutional Error: A Reappraisal, 83 Harv. L. Rev. 814, 820-821, is very much in point. The note states:

> "The overwhelming-evidence test asks whether the error at trial altered the verdict of the jury that heard the case. As noted earlier, this question can be answered when tainted evidence may be segregated and determined to be merely trivial or cumulative. The effect of some errors, however, cannot be so segregated since they affect the entire trial process, and in such cases no answer to the critical question can be given.
>
> "Such errors are those which bias the machinery for bringing evidence before the jury and into the record. A defect in this machinery necessarily raises doubts whether all relevant evidence is in the record and whether all evidence in the record is what it purports to be. For example, if the defendant was denied effective counsel or was incompetent to stand trial, there is no way of knowing what additional evidence could have been mustered to support his case or what successful attack could have been made on the evidence of the prosecution. If the prosecutor has manufactured or suppressed one piece of evidence, doubt arises whether other evidence has been unscrupulously handled. If a judge was biased against the defendant, it is uncertain how many of his discretionary decisions were infected with that bias. In all these cases there is no feasible way of segregating the tainted portion of the record and determining its effect on the jury beyond a reasonable doubt. Since there is no way of deciding that the error was harmless, the conviction must be reversed automatically."

In the circumstances of this case, for the prosecutor to have fed such information to the trial judge and for the trial judge to have digested it without ever informing petitioners or their counsel that he had done so is as much a violation of due process of law as this Court is ever likely to encounter. The Constitution of the United States cannot tolerate such practices. Under the Sixth Amendment petitioners were entitled to a public trial, not one heard in part on the basis of private communications between the prosecutor and the presiding judge. The right to an impartial jury under the same Amendment presupposes an impartial judge. They were entitled to be informed of the nature and cause of the accusation against them and to be confronted with the witnesses against them, not to be accused privately by the district attorney of being representatives of organized crime and conspirators to an uxoricide. They were entitled to have the assistance of counsel for their defense; that assistance is nugatory where counsel must meet accusations that they do not know have been made and argue issues that they do not know have been briefed. Terms like "fair trial," "impartial judge," and "due process of law" may be at times nebulous. At least, however, with respect to the conduct of the trial judge in the case at bar, they are not vague but have identifiable roots within the language of the Sixth Amendment. Having been deprived

of these rights, petitioners were deprived of due process of law.

VI. Petitioners were Constitutionally Entitled to See the Grand Jury Minutes of Baron's Testimony.

The Supreme Judicial Court recognized that petitioners probably should have been given access at least to the grand jury minutes of Joseph Baron's testimony (357 Mass. at 378). It held, however, that the motions were in effect premature and that they should have been renewed later in the trial.

We doubt that it will ever be possible to show more "particularized need" (*Dennis* v. *United States*, 384 U.S. 855, 873-874 (1966)) for grand jury minutes than that of petitioners in the case at bar. In the first place, since the prosecution of petitioners was for both conspiracy and being an accessory to murder in the first degree, it falls squarely within the statement in *Dennis*, *supra*, 873:

> "A conspiracy case carries with it the inevitable risk of wrongful attribution of responsibility to one or more of the multiple defendants. See, *e.g.*, *United States* v. *Bufalino*, 285 F. 2d 408, 417-418 (C.A. 2d Cir. 1960). Under these circumstances, it is especially important that the defense, the judge and the jury should have the assurance that the doors that may lead to truth have been unlocked."

In the second place, Baron, a notorious extortionist, robber and murderer, in exchange for his testimony in this and other trials, was being shown, not only in this case but in several other cases (see *Patriarca* v. *United States*, 402 F. 2d 314, 319

(1st Cir. 1968), cert. den. 393 U.S. 1022 (1969)), leniency beyond imagination. The record on this point in the present case is so fully identical with that in the *Patriarca* case that what was written at pages 318-319, *supra*, in that opinion by the Court of Appeals might as easily be said in the case at bar:

> "The testimony of Baron was central to the prosecution's case. . . .
>
> "Baron was a highly vulnerable witness. Not only had he spent almost half of his life in prison, but he had been assured that he would not be indicted for the crime at issue here if he testified before the grand jury. In addition he was told that his cooperation in this matter would be brought to the attention of the prosecution in other pending criminal cases. Money from his unlicensed loan operations continued to be sent to him while in prison. Fears for the safety of his wife and child led to her being allowed to live with him in protective custody. On at least two occasions discussions were had on his behalf with writers relating to a book based on his revelations and movie rights, both promising large returns. Letters which he sent from prison referred to FBI representatives saying to him 'If you help us, we will help you'; to the purpose of his transfer to the Barnstable House of Correction as being 'to brainwash me'; to having 'a few aces' up his sleeve; to his doing something sensational with the result that '30 would go' whether innocent or not. After he began to talk to the FBI about the subject matter of this case, there were some fourteen visits in each of which he would add some new detail either previously overlooked or concealed."

In the third place, Baron admitted at trial that he not only had lied to, or concealed part of his story from, the police

who investigated this matter in 1967 but also the grand jury itself.

Petitioners submit that the circumstances of this case are such that even the pre-trial denial of their motions to inspect the grand jury minutes would have been constitutional error. The fact, however, is that petitioners *repeatedly*, while the trial was in progress, requested to see the minutes of Baron's testimony. See Tr. 30, 3523, 3537, 3538, 3540; 32, 3846. The trial judge said before trial (Tr. 4/16/68, 41-44) that these minutes would be made available to petitioners' counsel after Baron's direct testimony was concluded and then whimsically changed his mind when petitioners renewed their request at the start of cross-examination. While petitioner Cassesso's consel was cross-examining Baron, after Baron's deals with the Commonwealth that led to his turning state's evidence had been explored and after Baron had evaded a question as to whether he had told the grand jury the truth (Tr. 32, 3834), the judge again refused grand jury minutes (Tr. 32, 3846). There was no hint in these rulings that the judge might consider changing his mind again. In view of the atmosphere in the courtroom during trial, to have pressed this point further after Tr. 32, 3846, would have been a form of lunacy. Petitioners submit that the assertion of their rights to grand jury minutes was plainly made and "is not to be defeated under the name of local practice." *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923).

We should not imagine that the production of grand jury minutes upon the showing of a particularized need is related only to some notion of "fundamental principles." *Palko* v. *Connecticut*, 302 U.S. 319, 328 (1937). On the contrary, its purpose is to effectuate one of the most important guarantees of the Bill of Rights, the Sixth Amendment right to confrontation. *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 683 (1958).

VII. Petitioners were Deprived of a Fair Trial by Comments and Conduct of the Trial Judge and the Prosecutor.

A. *Cumulative Effect of the Judge's Remarks.*

In discussing prosecutorial and judicial misconduct, the Court of Appeals said (Opinion, p. 10):

> "Given the length, complexity, and intensity of the trial, it is not surprising to find evidence of occasional lapses into ill temper. But we do not find any evidence of misconduct, singly or collectively, which was so egregious as to taint the essential fairness of the trial."

We think that the record will show the contrary, and although we shall deal shortly with some of the trial judge's more uninhibited outbursts against trial counsel, we cannot refrain from first examining in a general way the daily insults, *non sequiturs*, and unpleasantries that the judge continually hurled against petitioners and their counsel.

On one occasion when counsel suggested that Rule 71 of the Rules of the Superior Court[9] might profitably be enforced against the assistant district attorney (Tr. 27, 2989, 2999; 30, 3551, 3577-3578; 33, 4334; 48, 6963 *et passim*), the judge, who had been most stern about enforcing this rule against defense counsel (Tr. 26, 2882; 38, 4996), stated (Tr. 38, 4334):

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[9] Prior to July 1, 1974, Rule 71 stated:

> "Objections to evidence shall be decided without argument unless the presiding justice calls upon the parties to state the grounds upon which the evidence is offered or objected to."

"And let it be noted on the record that you kept standing after I asked you to be seated."

When counsel properly asked the judge to instruct the jury that a statement by the prosecutor that counsel had agreed not to ask witness Glavin certain questions was untrue, the following colloquy took place (Tr. 41, 5604-5605):

"Mr. Zalkind has suggested in front of this jury something you know is not true and I ask you to instruct this jury that I did not make any such agreement as he suggests.

"THE COURT: Proceed.

"MR. CHISHOLM: Will you instruct the jury? That is my motion.

"THE COURT: Proceed.

"MR. CHISHOLM: May I have an exception?

"THE COURT: Exception.

Exception No. 601

"MR. CHISHOLM: Would you ask the jury to disregard Mr. Zalkind's statement with regard —

"THE COURT: Proceed.

"MR. CHISHOLM: I move you instruct the jury to disregard Mr. Zalkind's remarks.

"THE COURT: My answer is to proceed.

"MR. CHISHOLM: Exception.

"THE COURT: Proceed."

In the cross-examination of Glavin, counsel introduced a record of Glavin's conviction of larceny by check resulting from Glavin's plea of guilty (Tr. 41, 5667). Though no sentence was imposed, it was clearly admissible. Mass. G.L. c. 233, § 240. The assistant district attorney stated (Tr. 41, 5667):

"Of course, your Honor knows that complaints that are filed cannot be admitted. But let it go in."

Defense counsel correctly asked the judge to instruct the jury to disregard the remark. *Commonwealth* v. *Nassar*, 354 Mass. 249, 264, 237 N.E. 2d 39 (1968). The judge thereupon accused counsel of delaying the trial and added (Tr. 41, 5668):

"Now, proceed with your cross-examination if you want to remain in this case."

The judge stated, when counsel objected to utterly immaterial testimony of Baron to the effect that Grieco has said that his "wife was driving him crazy" (Tr. 29, 3284), "I think any connection with 'the office' has something to do with this case." Even if the judge's ruling had been correct, this remark was totally out of order as well as totally unresponsive to the objection. Earlier in the trial, Baron had attempted to tie in "the office" with the Cosa Nostra (Tr. 28, 3220). So in effect the judge was now telling the jury that any connection with the Cosa Nostra was relevant to this case. This statement was plain and palpable error. Apparently, the judge made it for no better reason than to express his pique at defense counsel for daring to make a valid objection.

Instances of remarks and conduct of this type in the full hearing of the jury could be extended. The judge lost no opportunity in this case to insult counsel for the petitioners, belittle their ability, impugn their motives and challenge their veracity.

In *Bursten* v. *United States*, 395 F. 2d 976, 983 (5th Cir. 1968), the court stated:

> "It is well known, as a matter of judicial notice, that juries are highly sensitive to every utterance by the trial judge, the trial arbiter, and that some comments may be so highly prejudicial that even a strong admonition by the judge to the jury, that they are not bound by the judge's views, will not cure the error.
>
> "To be sure, admonition of counsel in hotly contested cases, such as this one, sometimes becomes requisite, even essential. Cf. United States v. Sacher, 182 F. 2d 416 (2d Cir. 1950). It is preferable, of course, that such corrections be made outside of hearing of the jury, but, for such conduct to constitute ground for reversal, it must appear that in some way the judge's conduct operated to deprive the defendant of his right to an impartial trial, such as to deprive him of effective assistance of counsel, or adversely influencing and prejudicing the jury. If a trial court continually intervenes so as to unnerve defense counsel and throw him off balance, in a supposedly fair trial, and causes him not to devote his best talents to the defense of his client, then this is ground for reversal, no matter what counsel's experience and equipoise may be. Even if there is a basis for some criticism of overpartisanship, of defense counsel, this does not justify unwonted and unnecessary continuous interruption. A trial judge must strive for total neutrality and complete circumspection, in the eyes and minds of the jury."

We submit that the judge in the present case substantially failed to achieve "total neutrality and complete circumspection, in the eyes and minds of the jury." We invite perusal of the Appendix to *Bursten*, *supra*, 984-987, and comparison with the conduct of Judge Forte in the Superior Court. See also *United States* v. *Guglielmini*, 384 F. 2d 602 (2d Cir. 1967). The Supreme Judicial Court did "not perceive judicial conduct in any degree comparable to that criticized in the cases relied on by [petitioner] Cassesso" (357 Mass. at 395). An attempt to meet this "nonperception" analytically would soon prove logically and rhetorically futile. The statements are there, and their intemperateness and hostility must speak for themselves. We ask in general only that they be read and measured against the requirements of due process as laid down in such cases as *Starr* v. *United States*, 153 U.S. 614, 626 (1894); *Hickory* v. *United States*, 160 U.S. 408, 415-418 (1896); *Quercia* v. *United States*, 289 U.S. 466, 470-472 (1933); *Holt* v. *Virginia*, 381 U.S. 131, 137 (1965).

B. *Imputing a False Statement to Defense Counsel.*

Petitioner Limone's counsel asked Stathopoulos on cross-examination: "Do you have to look at [the assistant district attorney] every time I ask you a question?" At first, the witness denied that he was looking at the assistant district attorney but upon persistent questioning began to admit that this was the case. Finally, he was asked (Tr. 39, 5072):

> "So you do admit you look at him before you answer yes or no?"

To this question the judge took it upon himself to answer (Tr. 39, 5072):

> "There's no evidence whatever of that. The Court has been watching. That is a false statement."

Petitioner Limone's trial counsel continues to believe that Stathopoulos was looking at the assistant district attorney for help on each question. At oral argument of this case in the Supreme Judicial Court the trial prosecutor, Mr. Zalkind, argued that the witness was indeed looking at him while under cross-examination but that his physical position in the court-room in relation to the witness made it unavoidable. We assume the general holding of the Supreme Judicial Court (357 Mass. at 404), that the trial judge may order counsel to cease and desist from what he regards an unfair cross-examination, to be correct. *Cf. Fisher* v. *Pace*, 336 U.S. 155, 161-162 (1949). But here the trial judge went far beyond such an order. He effectively testified for respondent on a matter controverted by the parties and the evidence. He was not under oath and not available for cross-examination. *Quercia* v. *United States, supra.* Petitioner's Sixth Amendment right to cross-examine a witness for the prosecution were trampled on. *Smith* v. *Illinois*, 390 U.S. 129, 131 (1968).

C. *The "Birds of a Feather" Remark.*

While cross-examining petitioner, the prosecutor asked him: "What did you do with the money that you got from the sale of this business?" Counsel for petitioner objected (Tr. 45, 6244), and a long colloquy followed. We need not at this point concern ourselves with whether the judge was correct in

overruling the objection and shall assume, for purposes of this argument only, that he was. *Cf.* argument II, D, *ante*.

He could not have been more wrong, however, in telling the jury that the evidence was admissible to show that Baron and petitioner were "birds of the same feathers," *i.e.*, that if petitioner associated with Baron he must have been guilty of the same crimes as Baron and vice versa. For, of course, the universally known aphorism from which the judge was quoting goes: "Birds of a feather flock together." Guilt by association is a doctrine which the First, Fifth and Fourteenth Amendments to the Constitution of the United States find most abhorrent. *Scales* v. *United States*, 367 U.S. 203, 224-225 (1961), reh. den. 366 U.S. 978 (1961). The Supreme Judicial Court found that the "remark was not, in context, to be construed as approving any theory of guilt by association" (357 Mass. at 404). This *ipse dixit* would at least seem less disingenuous, if the court had not noted one sentence earlier that a purpose of the whole line of questioning which led up to this comment was to show that petitioner (357 Mass. at 404) "may have had closer association with Baron than Limone had admitted, if they in fact operated in the same business in the same area."

D. *Remark to Observe the Petitioners' Physical Characteristics.*

Near the end of the assistant district attorney's rather lengthy opening, he asked the jury: "to look at the defendants during the . . . trial . . . for their physical characteristics." When defense counsel objected and moved that those remarks be stricken, the trial judge, possibly in a portent of things to come, ruled as follows:

"The remarks may stand. And I'm going to ask the jury to look at the judge and all counsel and all parties involved, not just the defendants, but all parties, including the District Attorney." (Tr. 2976-2977.)

There were six defendants seated in the enclosure immediately to the right of the jury box. Some of them were elderly — others were young. Some were tall and some were short. We would suppose that some could be considered more pleasing in countenance than others. Some were fair and some were dark. With the exception wrought by the wear and tear of everyday living or advancing age, all of them, it can probably be agreed, had fairly regular features. However, at no time during the course of the trial was any particular identifying characteristic relevant to any material issue.

We can only assume that the assistant district attorney felt that either individually or cumulatively the jury could draw an inference adverse to the defendants from some physical characteristic. Speculation in this regard, however, is needless. Since it did not appear at that point that the physical characteristics of any or all of these defendants would be material to some issue during the course of the trial, the trial judge should have stricken the inappropriate remark from the record. Instead, however, the trial court — in agreement with the suggestion that inferences could be drawn from physical characteristics — instructed the jury to look at himself and all counsel involved in the case.

We submit that it was highly improper for the trial court to risk the probability ("the remarks may stand") that the jury would be of the opinion that they had a right to draw an inference unfavorable to the defendants from the appearance of the defndants or their counsel.

The Supreme Judicial Court found that judge's remarks "amount[ed] to no more than a suggestion that the jurors carefully watch what was going on as an aid to appraising the evidence" (357 Mass. at 404). This is one more instance in which the Supreme Judicial Court found (ruled?) that a disparaging or intemperate remark by the trial judge meant something far different from what was said. It was gross error, we submit, to instruct the jury to look at petitioners' "physical characteristics"; they had nothing to do with the case on trial.

E. *Imputing Misconduct to Petitioner Grieco's Counsel on Baron's Military Record.*

The witness Baron, in his direct testimony, had testified that, prior to arriving at the scene of the murder, he and some of the defendants had made a trial run and viewed the prospective scene (357 Mass. at 366). In cross-examining the witness in this regard, counsel asked:

"Q. So that at this earlier time there was no directions given by you when you went to so-called reconnoiter the area for the mission: murder?"

To this the witness replied:

"A. Reconnoiter?" (Tr. 4363, 4364.)

We submit that it is almost universally understood that the term "reconnoiter" is usually associated in a military sense. From the querying manner of the witness's reply, it appeared

that he did not understand the meaning of the term. Whereupon, counsel queried:

> "Q. I know you were never in the service, but. . . ." (Tr. 4364.)

Whereupon, the witness replied:

> "A. Oh, I know what reconnoiter means." (Tr. 4364.)

Although the prosecutor had not objected to this series of questions, after the latter answer of the witness, the prosecutor stated:

> "MR. ZALKIND: I pray your Honor's judgment to this. What a cheap, shabby trick."

The court then stated:

> "I am going to ask the jury to disregard these remarks and to keep them in mind [*sic*] when you have to believe and what to disbelieve. Keep in mind the conduct of the witness and how they answer, *and the conduct of the attorneys, as well.*" (Tr. 4364.) (Emphasis supplied.)

The statement of counsel to the effect that the witness had never been in the service was perhaps unnecessary. However, it hardly could be considered as sufficiently prejudicial to warrant the extreme retaliatory attack made by the prosecution and accentuated by the court. At this point in the trial

it must be agreed that the picture the jury had of the witness Baron hardly measured up to an individual who at any time had been in the service of his country.

F. *Suggesting that Counsel was Inconveniencing the Jury.*

Toward the end of a long, hot day, represented in the record by almost two hundred pages of transcript, the following colloquy occurred:

> "MR. BALLIRO [Counsel for petitioner Tameleo]: If your Honor please, it's after 4:00 o'clock —
>
> "MR. ZALKIND: And I pray, your Honor, that we go on to 5:00 o'clock.
>
> "THE COURT: I want to get through with this cross-examination here. *We are not going to start all over tomorrow and have him* [Ronald J. Chisholm, Esquire, counsel for petitioner Cassesso] *repeat the same questions to him.* [Emphasis added.]
>
> "MR. CHISHOLM: I am not going to start —
>
> "THE COURT: We are going to continue until he finishes cross-examination. I know it's hot but we will —
>
> "MR. BALLIRO: The exchanges have been heated between counsel and the Court, and I think it's time to quit. . . .
>
> "THE COURT: The only ones whose comfort I'm going to look out for is the jurors and the witness. We are going to continue until the cross-examination is finished. *Tomorrow he will start and ask the same questions all over again.*" (Emphasis added.)

Counsel will be quick to agree that the trial judge, and no other person, is charged with the responsibility of determining

the length of the trial day. In this regard he must be given the greatest amount of latitude and is responsible for, and should see to it, that a sequestered jury is rendered every comfort and convenience for its onerous burden. All of this we endorse as measuring up to our common high ideals of the administration of criminal justice. By the same token, however, any suggestion that counsel is deliberately seeking to irritate the jury and unnecessarily inconveniencing them can only result in the most dire of adverse inferences to be drawn against petitioners. This exchange took place on July 18, 1968. The jury had been away from their homes and families together with all of the other attendant inconveniences of sequestration for over fifty days. The day itself had been long and, as noted by trial judge, was "hot." Under all of these circumstances it cannot otherwise be considered but that counsel's request to adjourn was reasonable. The court's retort unnecessarily suggested to the jury that counsel — or petitioners — were responsible for their inconveniences.

The Supreme Judicial Court disposed of this argument by saying (357 Mass. at 404-405):

> "Toward the close of a hot day, the trial judge declined to suspend the trial at 4 P.M. but insisted that cross-examination by Cassesso's counsel of Glavin, then on the stand, be completed that afternoon. 'We are not going to start all over tomorrow and have him repeat the same questions.' Judicial comment upon 'unusually protracted' cross-examination has been held permissible. . . . It was for the judge to determine, within a wide range of discretion, whether there was chance of completing that day cross-examination of a particular witness and the manner in which he would encourage avoidance of repetition."

The Supreme Judicial Court's position on this point is characterized by a total disregard of the issues. It begins with an assumption, entirely unfounded in the record, that counsel's cross-examination of Commonwealth's witness Glavin was "unusually protracted"; yet Glavin's testimony, admissible only against petitioner Cassesso (whose counsel was cross-examining), was in fact rather concise. It proceeds with a statement of law that is more than arguably wrong, at least as a matter of due process, that the court can comment in the presence of the jury on cross-examination that it regards as "unusually protracted." *Young* v. *United States*, 346 F. 2d 793, 795-796 (D.C. Cir. 1965). *Cf. United States* v. *Gorman*, 393 F. 2d 209, 212 (7th Cir. 1968) (no prejudice in admonition where given outside the hearing of the jury). Whether the trial judge was right or wrong in refusing to adjourn at counsel's suggestion, his remarks to the jury were totally unnecessary and highly prejudicial to petitioners.

G. *Remarks about Prejudicing Rights.*

Prosecution witness Robert Glavin having testified on direct examination as to conversations between himself and Mr. Cassesso (Tr. 41, 5564-5575), on cross-examination defense counsel attempted to question Glavin concerning aspects of the conversation relating to the Deegan matter (Tr. 41, 5621) that he admittedly had failed to disclose to the jury (Tr. 41, 5620). We submit that counsel's right to ask this question was clear beyond doubt and so argued in argument IV, B, *ante*. The judge, however, not only ruled the elicited testimony inadmissible and refused an offer of proof (Tr. 41, 5621), but then stated that counsel was violating instructions given by the court. In this the judge was in error; at no time did he ever instruct counsel that further inquiry into a matter so thorough-

ly opened up by the prosecution was out of order. But the judge went still further and addressed counsel as follows (Tr. 41, 5641-5642):

> "If you are seeking grounds for a mistrial, you are going to be mistaken, sir. . . .
>
> "You are not going to prejudice the rights of anyone else in this court room. Now, that is the reason why I am excluding it, and the record will speak for itself."

Here again, the judge, without any basis in fact, seriously impugned the *motives* of counsel, who was pursuing a course of conduct which he had a right, if not a duty, to pursue in order to protect his client's constitutional right to "fearless, vigorous and effective" advocacy. *Offutt* v. *United States*, 348 U.S. 11, 13 (1954), citing *Sacher* v. *United States*, 343 U.S. 1, 13 (1952). It also implies that petitioner's counsel lacked faith in winning his client's case before the sitting jury. The judge's remark was patent and obvious error. *United States* v. *Kelley*, 314 F. 2d 461, 463 (6th Cir. 1963). Even where, as was not the case here, counsel engages in improper argument, his *motives* must not be called into question.

The Supreme Judicial Court disposed of the assignment by saying (357 Mass. at 404):

> "On cross-examination, Cassesso's counsel asked Glavin certain questions which the judge thought might violate his instructions not to ask questions which might elicit answers containing references to the Cosa Nostra or the 'office' or to other defendants against whom the answers were not admissible. At one point after suggesting the impropriety of the particular inquiry, the judge said, 'You are not going to prejudice the rights of anyone else in this court room. Now, that is the reason why I am excluding it.' Cassesso saved an exception. In context the judge's remark was a method of telling counsel to obtain his information in a manner which would not require mentioning defendants other than Cassesso."

We may begin with the observation that the Supreme Judicial Court in its opinion had already ruled that the order which the judge was attempting to enforce (to refrain from asking Glavin questions that would include "the office" or "Cosa Nostra") was erroneous (357 Mass. at 389), although not a ground for reversal. If a judge must be cautious in reprimanding counsel for disobedience to a proper order, how much more caution is indicated when the validity of the order is doubtful or indeed improper? Be that as it may, we are again dealing with serious accusations against counsel for the accused with this accusation. Again it finds a "context" in which the judge is supposed to have meant something very different from what he said. If the judge meant to tell counsel to avoid asking questions in a way that would mention anyone but his client, he should have told him this plainly and simply, not accused him of trying to prejudice others' rights or obtain a mistrial.

H. *Statement about Defense Interruptions.*

Early in the trial (Tr. 29, 3303), Baron was asked about a conversation between himself and co-defendant Grieco. When it appeared that he was about to testify to hearsay concerning an utterly immaterial remark that Grieco had allegedly made, all counsel objected and, thereupon, the judge said (Tr. 29, 3303).

"I am going to ask the jury to draw their own inferences from the interruptions. Now, if the purpose of the interruptions is to break the narration and the story, that's one thing. Now, I'd like to have the jury get the evidence which is admissible."

The Supreme Judicial Court found that (357 Mass. at 394) in "context, the trial judge's remark was not criticism of ordinary or reasonable objections, but merely a comment, in effect, that the defence objections had been unduly frequent. The remark, in the middle of a long trial (fn. 2), amounted only to an admonition to avoid unnecessary delay and interruption." This comment on repetitive or unduly frequent objections comes with singularly ill grace from a court that seems to hope to require the taking of an exception to each and every separate question in order to save important constitutional rights. Where the preservation of federal rights depends upon such exceptions, the Supremacy Clause, as well as the Due Process Clause of the Fourteenth Amendment, forbids the "exaction of a price" (*Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967) and cases cited) from those who claim them in the form of adverse criticism from the bench.

I. *Violation of an Agreement.*

During cross-examination of Glavin, when petitioner Cassesso's counsel asked Glavin about certain prior inconsistent statements, the prosecutor accused counsel of violating an "agreement." See argument VI, A, *ante*. Nowhere in the record can such an agreement be found and counsel denied and continues to deny the existence of such an agreement (Tr. 41, 5604-5605). Where no such agreement appears in the

record and where the judge had heard no evidence that any off-the-record agreement was made, it was his duty to instruct the jury to disregard the prosecutor's remarks. "If counsel desired to testify he should have gone on the witness stand and subjected himself to cross-examination." *United States* v. *Socony-Vacuum Oil Co., Inc.*, 105 F. 2d 809, 839 (7th Cir. 1939), revd. on other grounds, 310 U.S. 150 (1940).

J. *A "Trick" Question.*

The following colloquy occurred on the cross-examination of Robert Glavin (Tr. 5639):

"Q. Now, yesterday you told us you were going to get this information of the Deegan matter from Cassesso, didn't you?"

"A. I don't believe so."

"Q. Well, let's look at this and see if this helps refresh your memory: 5441, Mr. Zalkind."

"A. Where do you want me to start?"

"MR. ZALKIND: Where are you pointing to?"

(Mr. Chisholm indicating on transcript.)

"MR. ZALKIND: Trick question, your Honor, again. Look at what he pointed to, your Honor. It has nothing to do with what he just asked him."

There was nothing tricky about this question, and it was perfectly proper for counsel to ask it. On motion of petitioner, the judge refused to instruct the jury to disregard the prosecutor's comment (Tr. 5639, 5640). To begin with, the

prosecutor's remark (once again) was in obvious violation of Rule 71 of the Rules of the Superior Court. Beyond that, it partook of the conduct strongly disapproved by this Court in *Berger* v. *United States*, 295 U.S. 78, 88-89 (1935).

K. *Asking the Jury to Use their Imagination.*

"It is elementary that a prosecutor may not import his own testimony into a criminal trial. . . . The prosecutor is not free to offer his opinion in lieu of calling an expert witness" and even though "the . . . [j]udge did give the jury the customary caution not to rely on statements of counsel, but to rely solely on the testimony and their own recollections thereof . . . prejudice cannot be avoided by 'mild judicial action,' and reversal is necessary. . . ." *King* v. *United States*, 372 F. 2d 383, 394 (D.C. Cir. 1967). See *Hall* v. *United States*, 150 U.S. 76, 78 (1893).

In his closing argument, the assistant district attorney, after referring to Baron's testimony that he went to the Ebb Tide and had a conversation with defendant Tameleo, argued:

> "Now, I suppose one might say 'Well, why did he go to Henry Tameleo?' Of course you have to use your imagination. There are many things in a court of law that can't be introduced." (Tr. 7402.)

Counsel immediately objected (see *Commonwealth* v. *Cabot*, 241 Mass. 131, 148, 135 N.E. 465 (1922)) and moved that the remarks be stricken (Tr. 7402).

The prosecutor's statement urging the jury to use their imagination was highly improper. Moreover, his "remarks on the availability of unused 'evidence' [were] clearly impermissible." *Kitchell* v. *United States*, 354 F. 2d 715, 719 (1st Cir. 1965).

In response to petitioners' objection and motion, the court did sustain the objection and ordered the word "imagination" to be stricken (Tr. 7043). Upon continued urging, however, that the jury be instructed to disregard the prosecutor's argument "that there are many things in a court of law that can't be introduced" (Tr. 7403-7404), the court then instructed the jury as follows:

> "Now, Mr. Foreman and member of the jury, first of all I want to repeat what I said at the very beginning — that when you were summoned here to serve as jurors you were not supposed to leave your common sense at home. You were to contribute your experience, what you have learned from the facts of life, your intelligence, your education, your knowledge of world affairs, and you are to use those talents in weighing the evidence.
>
> "I wish to add to that now that you are, as far as proof is concerned, you are limited to the evidence that was produced in court. You are limited to that evidence, and you are to decide whether that evidence is true or not. And if you decide that you can't accept it as true, that is the end of it. But if you decide that it is true, then you have the right to draw all the conclusions and inferences which reasonable people draw in every day life.
>
> "Now, that is the ruling I make. Now, any statement that there are facts which cannot be proved in court — well, if they cannot be proved in court, they shouldn't be mentioned in court, so you are to ignore such statements." (Tr. 7405-7406.)

That instruction not only magnified the prosecutor's impropriety, but it also failed to cure the prejudice. In the first place, the trial judge's charge could have had only one effect, that of emphasizing to the jury that, by using their "common sense" instead of their "imagination," they could reach the same result, namely, that Baron went to petitioner Tameleo to get "the office's approval" — the very evidence which defendants had sought to avoid by their motions for severance, and which the court had attempted to exclude by restricting the cross-examination of Glavin. In the second place, the instruction that "facts which cannot be proved in court . . . shouldn't be mentioned in court, so you are to ignore such statements," was grossly inadequate to cure the court-compounded prejudice.

In spite of the obvious impropriety of the argument by the assistant district attorney, he nonetheless failed to heed the mild admonition of the court and promptly proceeded to invoke the authority of the court in his insistence that the jury could speculate as to evidence not before them. After recounting some of the evidence that Baron had testified to, Commonwealth's counsel then proceeded to say:

> "Now, counsel challenges me to prove these facts. His Honor will instruct you that there are many things in the case that I cannot even try to introduce in evidence —
> "MR. BALLIRO: I object and ask that that argument be stricken." (Tr. 7441.)

The court sought to paraphrase the challenged argument with the following:

> "THE COURT: Well, you cannot introduce the evidence. Is that what you are trying to say?

> "MR. ZALKIND: I am saying that Mr. Balliro [counsel for petitioner Tameleo] has challenged me to introduce certain evidence and I am saying it would be improper to introduce it." (Tr. 7441.)

Defense counsel, getting the worst of the colloquy that followed his objection, insisted:

> "All I have done is object and ask that argument be stricken." (Tr. 7441.)

Upon the court's indicating that it would "discuss it at the bench," the Commonwealth attorney "graciously" withdrew his argument (Tr. 7441).

A review of the argument that had been made by Mr. Balliro fails to reveal what the prosecutor was talking about when he said counsel had "challenged" him to introduce certain evidence. In any event, the explanation given by the Commonwealth for its gross impropriety ought to receive short shrift because obviously, if counsel had improperly called upon the Commonwealth to prove something, the time for objection had long since gone past.

L. *Expectation of Interruptions.*

As we have argued above, counsel objected to the Commonwealth's first improper reference to the "many things in a court of law that can't be introduced." Apparently, although it took some time, the trial court agreed that the objection was valid and proceeded to give a two-page instruction in that regard to the jury (Tr. 7405-7406). Obviously, neither the

objection nor the court's instruction was much to the prosecution's liking; immediately after the court concluded instructing the jury the following colloquy took place:

> "MR. ZALKIND: I expect a lot of interruptions, ladies and gentlemen.
>
> "MR. BALLIRO: I object to that remark.
>
> "MR. CHISHOLM: I object to that.
>
> "THE COURT: What do you object to?
>
> "MR. ZALKIND: I said that I expect a lot of interruptions, and I am sure I will get them.
>
> "MR. BALLIRO: I object. There will be no objection if Mr. Zalkind is proper in his argument, your Honor.
>
> "MR. CHISHOLM: That's right.
>
> "THE COURT: Is he reading from the record? Why do you object?
>
> "MR. ZALKIND: That's what I am doing.
>
> "MR. MCLAUGHLIN: He said 'I expect a lot of interruptions.'
>
> "THE COURT: And he's getting them. I see he is and the jury is seeing he is getting interruptions.
>
> "Now, he has the right to read from the record. I am going to let him read from the record."

Of course, the only thing that counsel had objected to was the prosecutor's snide and completely uncalled for remark to the effect that: "I expect a lot of interruptions . . . " to which he added in further colloquy: " . . . and I am sure I will get them."

Instead of promptly admonishing the prosecutor and instructing the jury that counsel had a right and a duty to object immediately to improper argument, the court supplied an excuse for the remark and suggested that counsel was objecting

to the prosecutor's "reading from the record." The prosecutor was not reading from the record. In spite of the fact that counsel sought to correct the court and direct its attention to the remark "I expect a lot of interruptions," the court refused to be dissuaded from its erroneous position.

M. *The Absence of Puopolo.*

At the very heart of the Commonwealth's case against petitioners was the Commonwealth's theory, as testified to by Baron, that the contract to kill Deegan was authorized because Deegan allegedly killed one Sacramone and had robbed the home of one Carmine Puopolo (Tr. 7400). There was a complete and utter lack of evidence to corroborate the witness Baron in this most important regard. Yet, the trial court permitted the Commonwealth to employ rhetorical questions that would allow the jury to speculate that Baron's testimony was true and, without any evidence to that effect, that petitioners had secreted Puopolo. The arguments and colloquy were as follows:

> "Now, what is the conversation? Peter Limone says 'Look, Joe, the office is a little excited about this guy Teddie Deegan' and he tells him why. He tells him that a kid named Sacramone was killed. The Commonwealth corroborates the fact, and, again, I don't want to use that word 'corroborate,' *is it coincidental that a kid named Sacramone was killed?* You heard evidence he was killed some four or five months prior to this incident.
>
> "Now he tells you that Carmine Puopolo, a bookmaker, got his house robbed of $81,000.00. Is it coincidental, ladies and gentlemen, that when the Commonwealth calls

Carmine Puopolo, he's not anywhere to be —" [Emphasis added.]

"MR. BALLIRO: I object.

"MR. PARIS: Objection.

"MR. MCLAUGHLIN: Objection.

"MR. CHISHOLM: I object, your Honor.

"MR. ZALKIND: *Of course, they object, your Honor.*

"MR. BALLIRO: I object and move that his remarks be stricken.

"THE COURT: All right. Objection overruled." (Emphasis supplied.) (Tr. 7400.)

The Supreme Judicial Court found the prosecutor's argument "not prejudicial" because it was "never finished" (357 Mass. at 403). But it is inconceivable that the jury failed to supply the unsaid word ("found") and, in view of the judge's overruling of petitioners' objections, to accept the prosecutor's argument as valid.

N. *Comment on Failure of Petitioner Cassesso to Deny he was in Florida.*

In his summation the prosecutor commented:

> "In any event, he [Baron-Barboza] says he met Ronnie Cassesso down there [in Florida]. There's no denying by anyone that Ronnie Cassesso was not [*sic*] there." (Tr. 51, 7412, 7413.)

The Supreme Judicial Court found that this could (357 Mass. at 403) "not be interpreted as comment on Cassesso's

failure to take the stand" because "any person who had seen [petitioner] elsewhere at the designated time could have testified to the fact." This rationalization overlooks the circumstance that petitioner would have had to find witnesses to account for his whereabouts over an alleged four-week period (Tr. 3254-3279) in the winter of 1965 and the practical problems of bringing out-of-state witnesses to give such an accounting. Theoretically, perhaps, others could have given this testimony; practically only petitioner could give it. We shall not labor the point that the Fifth and Fourteenth Amendments proscribe any comment, direct or indirect, upon petitioner's failure to testify. *Griffin* v. *California*, 380 U.S. 609, 614-615 (1965).

O. *Comments on Lack of Dignity in Courtroom.*

The petitioners were entitled to have stricken the inappropriate remarks (Tr. 35, 4341-4342) of the assistant district attorney which suggested, in relation to Baron's allegations that petitioner Grieco's attorney was and had long been anti-Semitic, that counsel rather than the witness was to blame for the witness's exclamation:

> "MR. ZALKIND: Is there no dignity in this court room?"
>
> "MR. O'DONNELL: That was brought in by the government, not by me."
>
> "MR. ZALKIND: Is there no sense of justice in this court room to permit this type of examination?"

The trial court denied a motion that these remarks be stricken.

If there was at this time a lack of dignity in the courtroom, it was the Commonwealth's witness who was primarily to

blame. We agree with the assistant district attorney's suggestion that a sense of justice was missing from the court but submit that it was petitioners who suffered in consequence. The remarks of the assistant district attorney were entirely inappropriate.

The suggestion by the Supreme Judicial Court that the prosecutor was "baited" into this "inappropriate" remark (357 Mass. at 403) lacks a foundation in the record. Indeed, several minutes appear to have elapsed between the question of counsel and the prosecutor's gratuitous insult.

P. *Identification of Petitioner Cassesso as Defendant in Other Case.*

When counsel attempted to cross-examine prosecution witness Robert Glavin from grand jury minutes, the assistant district attorney averred, pointing at petitioner Cassesso (Tr. 42, 5686):

> "This is grand jury testimony in another case where this man is presently a defendant." (Tr. 41, 5652.)

Petitioner immediately moved for mistrial. The Supreme Judicial Court met the contention that the denial of mistrial was error by saying (357 Mass. at 403):

> "A reference by the assistant district attorney to 'grand jury testimony in another case where this man [Cassesso] is presently a defendant' was not very clear. The judge promptly instructed the jury that it be disregarded."

We submit (a) that the reference was reasonably clear and (b) that the judge did not *promptly* ask the jury to disregard it.

As soon as the assistant district attorney made his statement, Mr. Cassesso's counsel moved for a mistrial (Tr. 41, 5652), a motion that would have been most unlikely if the reference had not been to his client. There was the next day the following colloquy among the judge, the prosecutor, and the defense counsel (Tr. 42, 5685-5686):

> "MR. ZALKIND: I don't want to belabor this but let me just say this. First of all, that statement by itself means absolutely nothing.
> "THE COURT: It means this man —
> "MR. ZALKIND: Which man?
> "MR. STANZIANI: Cassesso.
> "THE COURT: Oh, I understand this to refer to Mr. Cassesso.
> "MR. ZALKIND: I did not use the name Cassesso.
> "MR. STANZIANI: You pointed to him.
> "MR. CHISHOLM: The record should reflect that when Mr. Zalkind made the statement, he turned and pointed to the defendants' box and the record should reflect that.
> "MR. STANZIANI: I saw that.
> "MR. CHISHOLM: I would like to see Mr. Zalkind deny that. He's here.
> "MR. ZALKIND: I deny nothing and accept nothing. I say the record doesn't indicate anything. And if it does indicate something, it's because Mr. Chisholm opened up the grand jury testimony. . . ."

It is a familiar rule of law that one who fails to deny a statement at a time when by natural instincts he would do

so may be thought to have acquiesced therein. *Turner* v. *Yates*, 16 How. 14, 27 (1853).

But the judge's reaction to this incident was even more astounding. So as not to lose any of the flavor, we quote in full from Tr. 41, 5652, where this incident occurred.

> "MR. ZALKIND: This is grand jury testimony in another case where this man is presently a defendant.
>
> "MR. CHISHOLM: Judge, I move for a mistrial based on the remarks of Mr. Zalkind.
>
> "THE COURT: That's what you've been working on all afternoon. I exclude the question [a question put to Glavin earlier by Mr. Chisholm]. Proceed.
>
> "MR. CHISHOLM: May I have a ruling on my motion?
>
> "THE COURT: I deny the motion, also.
>
> "MR. CHISHOLM: I except to your Honor's ruling.
>
> Exception No. 629.
>
> "THE COURT: Yes, and I am going to ask the jury to disregard the district attorney's statement.
>
> "MR. CHISHOLM: Thank you, your Honor."

It would be sheer folly to imagine that in these circumstances the jury disregarded the prosecutor's comment. *Stewart* v. *United States*, 366 U.S. 1, 10 (1961). *Bruton* v. *United States*, *supra*, 137.

We submit in the first place that due process generally and the requirement of an unbiased jury in particular require that the jury be not informed that a defendant is or was involved in any other criminal proceeding unless it is necessary to show such involvement in the case on trial. *Hall* v. *United States*, 150 U.S. 76, 81-82 (1893); *Marshall* v. *United States*, 360 U.S.

310, 312-313 (1959). *Cf. Spencer* v. *Texas*, 385 U.S. 554 (1967). But even if the rule were otherwise, such information ought not in any circumstances to come from the prosecutor, who is not a witness and not available, as required by the Sixth Amendment, for cross-examination. *United States* v. *Socony-Vacuum Oil Co., Inc., supra.* See *Commonwealth* v. *Homer, supra*, 536.

VIII. PETITIONERS WERE CONSTITUTIONALLY ENTITLED TO HAVE THE JURY INSTRUCTED THAT THE TESTIMONY OF AN ACCOMPLICE OR AN INFORMER IS TO BE CAREFULLY SCRUTINIZED.

The trial court had more than sufficient notice that the Commonwealth's chief witness, Baron, was not only an accomplice, by virtue of his plea of guilty to the conspiracy indictments, but in every sense of the word was an accessory before the fact to the crime of murder. He was obviously an informer. By his own testimony, Baron was the central person in the killing of Deegan and the intended killing of the witness Stathopoulos. The characterization of Baron by the Court of Appeals for the First Circuit in *Patriarca* v. *United States, supra*, applied in every respect to the instant case.

Prior to the charge, all defendants had filed requests for jury instructions. The trial court had indicated that it was going to allow the defendants' request to instruct the jury that the testimony of the witness Baron should be "scrutinized with care and caution." Then whimsically changing his mind, the judge, instead, charged the jury:

> "Now, much was said about corroboration. Well, of course, a person who admits himself to be an accomplice

of a crime is a criminal himself, and that in itself *raises a question*, but that does not mean that you cannot believe an accomplice. The evidence of an accomplice need not be corroborated by other witnesses. *Whether you should believe it or not remains for you to say.*" (Tr. 7474.)

" . . . the uncorroborated evidence of an accomplice is competent and sufficient evidence if you choose to give it that importance. It's all up to you." (Tr. 7475.) (Emphasis supplied.)

Following settled principles of Massachusetts law, the Supreme Judicial Court held (357 Mass. at 396) that a "trial judge may tell the jury to scrutinize the testimony of an accomplice with care, especially when the testimony is not corroborated" but "is not required to do so." We submit that the failure to give such an instruction deprived petitioners of a fair trial within the purview of the Due Process Clause.

It appears that every Circuit in the United States court system requires the giving of a cautionary instruction on request and that several Circuits hold the failure to give such an instruction, whether requested or not, reversible error. Underhill's Criminal Evidence, vol. 1, § 181, pp. 526-529. The Court of Appeals for the First Circuit has recently cautioned all trial judges on the giving of a cautionary charge. *United States* v. *House*, 471 F. 2d 886, 888 (1st Cir. 1973). The cases cited in Anderson, Wharton's Criminal Evidence (12th Ed.), vol. 2, pp. 222-223, indicate that almost every state has a rule requiring the giving of an accomplice instruction, at least on request.

As this Court said in *Hoffa* v. *United States*, *supra*, 311-312:

"The petitioner is quite correct in the contention that Partin, perhaps even more than most informers, may have had motives to lie. But it does not follow that his testimony was untrue, nor does it follow that his testimony was constitutionally inadmissible. The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, *and the credibility of his testimony to be determined by a properly instructed jury*. At the trial of this case, Partin was subjected to rigorous cross-examination, and the extent and nature of his dealings with federal and state authorities were insistently explored.

"The trial judge instructed the jury, both specifically and generally, with regard to assessing Partin's credibility." (Emphasis supplied.)

Baron's motive to lie at petitioners' trial was at least as great as Partlin's in the *Hoffa* case. We submit that where Baron was both an informer and an accomplice, the absence of an instruction as to his credibility so undermined the integrity of the fact-finding processes as to deprive petitioners of due process.

IX. It was Error to Give Instructions Shifting the Burden of Proof.

Whatever doubt may previously have existed, it is now clear that in a criminal case the Fourteenth Amendment's "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). We start at this premise and labor it no further.

In the case at bar, the judge charged the jury *inter alia* (Tr. 51, 7478):

> "Now, with regard to the three different charges, let me discuss conspiracy first. This is practically the simplest crime to commit and yet one of the most difficult to prove, at times."

This charge seems to be entirely the frolic of the trial judge. There is not, so far as petitioners can find, a reported case in which the judge was permitted to charge the jury that any crime is easy to commit and difficult to prove. To begin with, as to conspiracy, the statement is not true. If any crime is "simplest to commit," surely one that necessarily involves more than one person is not such a crime. Nor is conspiracy particularly difficult to prove; indeed, the relaxed relevancy requirements in trial of conspiracy cases in Massachusetts (Toomey, *op. cit.*, 237) makes conspiracy one of the easier crimes to prove unless, of course, the government has no evidence whatsoever.

But if the proposition stated in the instruction were true, it should not have been given. However difficult the burden may be in any particular case or any particular class of cases, the burden of proof in a criminal case remains on the Commonwealth. To comment on that difficulty and to contrast it with the ease enjoyed by petitioners in committing the crime is, we continue to suggest, a plain and open invitation to the jury to shift or ameliorate the Commonwealth's burden. The Supreme Judicial Court perceived "no merit" (357 Mass. at 405) in this suggestion, and issue is, so to speak, joined on this point.

Various petitioners offered the defense of alibi. Over objection and exception, the trial judge charged the jury on alibi in

the words of *Commonwealth* v. *Webster*, 5 Cush. 295, 319 (1850). The Supreme Judicial Court noted that the judge had charged with respect to proof by the Commonwealth of guilt beyond a reasonable doubt and made it clear that the burden of such proof rests upon the Commonwealth and held: "The rule of the *Webster* case does not shift to the defence the burden of proving an alibi or lack of guilt" (357 Mass. at 405).

How should petitioner Limone reply to this *ipse dixit*? It may be of some significance that in the past decade the argument that *Webster* shifts the burden of proof has been presented to the Supreme Judicial Court in at least six different cases. See, in addition to the cases cited by the court, *Commonwealth* v. *Richardson*, 354 Mass. 773, 241 N.E. 2d 924 (1968); *Commonwealth* v. *Redmond*, 357 Mass. 333, 343, 258 N.E. 2d 287 (1970). It may be of even greater significance that the Supreme Judicial Court, while continually maintaining in the cases cited that *Webster* does not shift the burden of proof, in *Commonwealth* v. *Sullivan*, 354 Mass. 598, 607-608, 239 N.E. 2d 5 (1968), cert. den. 393 U.S. 1056 (1969), upheld *Webster* on the premise that the judge had charged the jury explicitly that notwithstanding the defense alibi the burden of proof remains upon the Commonwealth.[10] In *Redmond*, *supra*, 343, the court went further and held:

> "Instructions on the defence of alibi in the language of the *Webster* case are correct. However, if such language is used, care should be exercised by the trial judge to make clear to the jury (a) that they are the sole judges of the credibility and weight of the evidence on the alibi, (b) that notwithstanding the defendant's defence of alibi, the burden remains on the Commonwealth to prove

[10] No such instruction was given in the case at bar, though the judge did give the usual instruction on the Commonwealth's burden.

beyond a reasonable doubt all of the essential elements of the crime charged, and (c) that the defendant has no burden of proving his innocence."

The charge has been severely criticized (*Sullivan* v. *Scafati*, 428 F. 2d 1023, 1025-1026 (1st Cir. 1970), cert. den. 400 U.S. 1001 (1971) (Blackmun, J., dissenting)) and under the most recent discussions of the Supreme Judicial Court is now rarely given in Massachusetts. *Commonwealth* v. *McLeod*, 1975 Mass. Adv. Sh. 1178, 1181, 326 N.E. 2d 905.

But what of the language of *Webster* itself? Again we assume, *arguendo*, that it would be proper to instruct the jury that the defense of alibi should be carefully scrutinized, that the so-called "precautionary or disparagement" language (*Johnson* v. *Bennett*, 414 F. 2d 50, 55 (8th Cir. 1969)) would pass constitutional muster. But *cf. State* v. *Johnson*, 221 Iowa 8, 264 N.W. 596, 602 (1936) (instruction that alibi is "a defense easily manufactured" held, *semble*, more likely to shift burden than instruction that burden is upon accused to prove defense). We assume even further that in a case, unlike the present, in which there is actual evidence that the alibi was "attempted by contrivance, subordination and perjury," it would be proper for the court to comment thereon. *Cf. Reagan* v. *United States*, 157 U.S. 301, 310-311 (1895). We submit, however, that when the judge instructs the jury as a matter of law that alibi is attempted by "subordination, contrivance and perjury," the respondent's burden has been impermissibly lightened. Common sense and common experience remind us that where the accused comes forward with an alibi, the jury must decide whether it believes the government's evidence, presumably showing that he had an opportunity to commit the crime, or the accused's evidence that he lacked the opportunity. If the jury finds itself unable to

decide whose evidence it believes or finds the evidence of both the government and the accused equally convincing, it must acquit for the guilt of the accused will not have been proven beyond a reasonable doubt. The government's evidence of opportunity must clearly outweigh the accused's evidence of lack of opportunity. *Cf. Stump* v. *Bennett*, 398 F. 2d 111, 115 (8th Cir. 1968). To detract artificially by force of law from the alibi evidence presented by the accused is inexorably to mitigate the burden upon the government.

X. Petitioner Henry Tameleo was Entitled to Rest at the Close of the Commonwealth's Case.

Of the many important decisions to be made by defense counsel in a criminal case, none is more serious than that of deciding whether to rest at the conclusion of the Commonwealth's case in chief. After over seven weeks of trial the Commonwealth rested its case, and petitioner Henry Tameleo rested his case (Tr. 6068) without putting on any evidence. The trial proceeded for ten days thereafter. In a lengthy lobby conference (Tr. 6068-6085) the petitioner vainly argued that (1) the petitioner should be permitted to argue his case to the jury, (2) any future evidence should be subject to a limiting instruction, (3) the petitioner should not be compelled to remain seated before the jury for the remainder of the case, (4) that it would be an abuse of discretion for the court to permit the Commonwealth to introduce any further evidence against petitioner Tameleo, and (5) the only cure was severance. In some pertinent part counsel stated:

"Mr. Balliro: . . . Part of my judgment is based upon the fact that co-defendants are going to take the stand, that I anticipate my case is going to look much

blacker after defense and rebuttal is in than it looks right now. I am willing, in my judgment, to take on what I have now. . . ." (Tr. 6080.)

"MR. BALLIRO: If Mr. Tameleo was being tried alone, there would be no rights for me to cross-examine on and there would be no way in which prejudicial, damaging uneradicable impressions could be made as far as Mr. Tameleo is concerned. . . .

"My duty is to Mr. Tameleo, to exercise my judgment on his behalf, I feel in my mind that the Commonwealth has not made out a case beyond a reasonable doubt. I cannot be forced to submit to a further case when all the evidence is closed as far as Mr. Tameleo is concerned. . . ." (Tr. 6072.)

The issue was clearly joined by the court:

> "THE COURT: You have several good questions there. That is a good question, an excellent question. It all depends upon what the Supreme Court is going to do. . . ." (Tr. 6072.)

The manner in which the petitioner was going to be prejudiced was happily predicted by the prosecutor:

> "MR. ZALKIND: I will put it in the record that I anticipate some of these defendants are going to take the stand, and I will tell Mr. Balliro right now that I intend to elicit from them, if I can, evidence that will definitely incriminate Mr. Tameleo. . . ." (Tr. 6079-6080.)

The prosecutor also correctly prophesied that he would be putting in further evidence against Mr. Tameleo (Tr. 6077). There were in fact numerous references to petitioner Tameleo in the cross-examination of persons who testified against other petitioners, and several of these were, although the Supreme Judicial Court deemed them not "of great significance" (357 Mass. at 397), highly prejudicial to petitioner.[11]

We do not agree with the Supreme Judicial Court that the trial judge "had the discretion to receive . . . against [petitioner] any later evidence concerning him which might be brought out through defence witnesses" (357 Mass. at 397). We submit that the burden was on the Commonwealth to prove petitioner's guilt beyond a reasonable doubt. *Estelle* v. *Williams*, 96 S. Ct. 1691, 1692-1693 (1976). This means that petitioner had the right to rest at the close of the Commonwealth's case and put the Commonwealth to its proof. The Commonwealth was not entitled to rely on witnesses offered by co-defendants to establish petitioner's guilt. The rule on proof beyond a reasonable doubt is one, we submit, that should apply with equal force whether the accused is tried alone or with others.

XI. PETITIONERS WERE ENTITLED TO A NEW TRIAL BECAUSE OF THE SUPPRESSION OF EXCULPATORY EVIDENCE AND BECAUSE OF NEWLY DISCOVERED EVIDENCE.

A. *Status of Affidavits Filed by Petitioners and their Right to an Evidentiary Hearing in the District Court.*

All petitioners filed in the Superior Court similar motions for new trial attaching to these motions the same affidavits of

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[11] Most of this evidence suggested strong and long-standing relationships between petitioner Tameleo and other petitioners (Tr. 6319-6320, 6324, 6436, 6469, 6687, 6715).

David Berman and William Stuart. See *Earl* v. *Commonwealth*, 356 Mass. 181, 184, 248 N.E. 2d 498, 500 (1969). In addition, petitioners attached to, or incorporated by reference in support of, these motions an affidavit of Joseph Baron a/k/a Joseph Barboza. The last paragraph of each motion stated (R. 6, 22):

> "And defendant says that he is entitled to a new trial under the Due Process clause of the Fourteenth Amendment to the Constitution of the United States."

The motions were assigned for "hearing" before Judge Forte (the judge who presided at the trial) on October 14, 1970. Prior to hearing counsel were informed by the Clerk not to bring witnesses or evidence to the courtroom (see Tr. 1), that the sole question which Judge Forte would decide that day was whether an evidentiary hearing was warranted by the affidavits. At the hearing counsel for petitioner Limone, acting that day for petitioner Cassesso as well (Tr. 6), stated at Tr. 10-11:

> "May it please the Court, I am entirely without any means of verifying the facts contained in that sheet [the report] attached to my affidavit. I am without any means of verifying whether or not this report actually exists, unless I am granted an evidentiary type of hearing upon which to verify it."

Again Limone's counsel stated at Tr. 26-27:

> "I would like to suggest that under the rule of such cases as *Giles* v. *Maryland*, decided by the Supreme

> Court of the United States and *Brady* v. *Maryland*, that the 14th amendment to the Constitution of the United States requires that the District Attorney's office make information like this available to defense counsel, even if it is not admissible in court."

After hearing, the Superior Court did not act upon the motions. Counsel for petitioner Tameleo indicated that he wanted thirty days within which to file additional or supplementary affidavits. Other petitioners' counsel never requested any additional time and made clear to the judge their opinion that under the Fourteenth Amendment their clients were entitled to an evidentiary hearing on a new trial on the affidavits then before the court. At the end of thirty days no further affidavits were filed by any defendant and Judge Forte denied and dismissed petitioners' motion for new trial. Petitioners Limone and Cassesso claimed exceptions and appealed to the Supreme Judicial Court.

In their brief in the Supreme Judicial Court on motion for new trial, petitioners Limone and Cassesso stated (Bf. 4):

> "We start out with a fundamental postulate: that when a state court denies a motion for new trial grounded on the denial of Fourteenth Amendment rights solely on the basis of unrefuted affidavits and facts therein stated, these facts must be taken as true. *Cochran* v. *Kansas*, 316 U.S. 255, 257 [1942]. *Pyle* v. *Kansas*, 317 U.S. 213, 215, 216 [1942]. *Williams* v. *Kaiser*, 323 U.S. 471, 476-477 [1945]."

To this the Supreme Judicial Court responded in a footnote (360 Mass. at 575, fn. 2):

"We do not accept the extreme interpretation by defence counsel of *Cochran* v. *Kansas*, 316 U.S. 255, 257-258 (prison officials' suppression of appeal documents); *Pyle* v. *Kansas*, 317 U.S. 213, 215-216 (prosecution's alleged knowing use of perjured testimony); and *Williams* v. *Kaiser*, 323 U.S. 471, 473-477 (denial of counsel in capital case). These decisions (as we read them) do not purport to require a judge to accept as true allegations concerning the facts of alleged crimes contained in affidavits filed in support of motions for new trials. Those three cases seem to rest upon the prosecution's failure to controvert specific post-conviction allegations made by an apparently unrepresented prisoner about particular denials (during a prosecution) of his constitutional rights, which allegations, if true, required relief. The situation is unlike that here presented where the affidavits either inadequately set forth the facts relied on for relief or set forth largely (but probably not entirely) inadmissible expected hearsay testimony concerning the circumstances of a crime."

The Supreme Judicial Court seemed to distinguish these three cases on two (or possibly three) grounds: 1. In the *Cochran*, *Pyle* and *Williams* cases, the statement contained in the affidavits was unrefuted. 2. In the *Cochran*, *Pyle* and *Williams* cases, the evidence of perjury was admissible. 3. (possibly) The obtaining of a conviction through the knowing use of perjured testimony is constitutionally different from the suppression of exculpatory evidence. Let us consider these distinctions *seriatim*.

The first distinction is no distinction at all. Respondent in the case at bar has never made any effort to refute petitioners' affidavits. Since the report annexed to Mr. Berman's affidavit

is alleged on information and belief to be an actual police report, it is significant that the respondent, having had a copy of the affidavit and the alleged report for almost six years, has never bothered to deny its authenticity, even when petitioner's counsel invited the assistant district attorney to do so in oral argument before both the Superior Court (Tr. 13-14) and the Supreme Judicial Court. It is a familiar rule of law that one who fails to deny a statement at a time when by natural instincts he would do so may be thought to have acquiesced therein. *Turner* v. *Yates*, *supra*. The affidavits presented by the present petitioners are as "uncontroverted" as any that have ever been submitted.

The second distinction rests upon the hearsay nature of the Berman and Stuart affidavits. We agree that the Berman affidavit is almost entirely hearsay. Its significance depends entirely on the authenticity of the report upon the failure of the respondent to deny or challenge it. If the Supreme Judicial Court intended to say in its opinion (and we do not believe it did) that the contents of the report could not have been used at trial to cross-examine Baron and Stathopoulos on its grossly inconsistent versions of the stories given by them to the jury, it surely misconstrues the meaning of the Sixth Amendment right to cross-examination. *Pointer* v. *Texas*, *supra*; *Brookhart* v. *Janis*, *supra*; *Smith* v. *Illinois*, *supra*.

The Supreme Judicial Court does not say what part of the Stuart essay is hearsay. We assume that so much of it as relates Edward Bennett's story of the murder is hearsay but submit that had even this information been given to petitioners' counsel before trial it could have led to the discovery of admissible evidence valuable to the defense. On the other hand, Romeo Martin's statement was more than arguably admissible. Upon the Commonwealth's theory of the case, he was a co-conspirator and joint venturer in Deegan's murder and his statement to Officer Stuart, shortly after March 14, 1965, almost surely came while the conspiracy was still in

existence. *Commonwealth* v. *Kerrigan*, 345 Mass. 508, 510, 188 N.E. 2d 484 (1963).

Furthermore, whether the statements contained in Officer Stuart's and Mr. Berman's affidavits are admissible should have no logical bearing on whether, for purposes of the *Cochran-Pyle-Williams* rule, they must, if uncontroverted, be taken as true.

The Supreme Judicial Court may be read to imply that *Cochran* and *Pyle* are distinguishable because one rests on the knowing use of perjured testimony whereas the affidavits in the case at bar suggest the suppression of exculpatory evidence. The difference is illusory. Both of these "sins" against the Due Process Clause of the Fourteenth Amendment are canonically the same: they undermine the integrity of the fact-finding processes. *Baxter* v. *Palmigiano*, 96 S. Ct. 1551, 1558 (1976). This Court has recognized their similarity when in the case of *Giglio* v. *United States*, 405 U.S. 150 (1972), it reversed the conviction of one who had been convicted on the testimony of a co-conspirator where the co-conspirator had been promised immunity from prosecution in return for his testimony and the fact of this promise had not been revealed to the defendant. Although *Giglio* was clearly a case of suppression of exculpatory evidence rather than perjury, this court in reversing relied heavily on the case of *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959), in which perjury, not suppression, was clearly the issue.

Moreover, even if petitioners for purposes of federal habeas corpus proceedings were not entitled to have these affidavits taken as true, they were at least entitled to an evidentiary hearing on request.[12] In the landmark case of *Townsend* v. *Sain*, 372 U.S. 293, 313 (1963), this Court held:

[12] Petitioners requested such a hearing in the District Court on this point, and the court declined to hold one.

> "We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing."

In the present case, the state court held no evidentiary hearing at all on petitioners' motions for new trial, and all the evidence was newly discovered. Although the bases of the right to an evidentiary hearing in the District Court are stated disjunctively, here every such basis is found.

B. *Petitioners are Entitled to a New Trial Because of Suppression of Exculpatory Evidence.*

The affidavits annexed to petitioners' motions for new trial are discussed by the Supreme Judicial Court at 360 Mass. at 572-578. We now discuss them in greater detail.

1. The Berman Affidavit.

The only statements in counsel's affidavit not made on information and belief are his representation of Peter Limone, the delivery to him by an unknown person of what purports

to be a police report of interviews with Anthony Stathopoulos, a witness who supposedly corroborated Baron's testimony (see 357 Mass. at 362, 368) and the substantial inconsistency between the statements in that report and Baron's and Stathopoulos' testimony at the trial. Both the authenticity of the report and its availability to the prosecutor at trial are alleged only on information and belief.

What are the inconsistencies between the report and testimony at trial? (The opinion of the Supreme Judicial Court "assumes" such inconsistencies but did not discuss them.) The first part of the report seems to have been prepared on September 8, 1967. This, we should note, is the date of Stathopoulos' interview with Baron (357 Mass. at 383) and was presumably prepared after Stathopoulos had a chance to learn Baron's story and the Commonwealth's theory of the case. Nevertheless, it contains important discrepancies. We list them.

a. Baron testified at the trial that French had told him on March 11, 1965, that Deegan, French and Stathopoulos were going to burglarize a finance company in Chelsea (Tr. 3317-3318). Stathopoulos' statements in the report, however, show that he, French and Deegan did not arrange the Chelsea burglary until March 12, 1965:

> "At approximately 12 noon the day of the break (March 12, 1965) Deegan and 'S' had another meeting with the informant. The discussion took place regarding the best time to make this break and it was decided that it would be done that night prior to midnight. 'S' and 'D' left the informant and proceeded to the 10-pin bowling alley located on Broadway, Saugus where they met one Roy French. 'D' at that time asked French in on the score and told him of the plans."

We should note that Stathopoulos' statement quoted in the report, but not his or Baron's testimony at the trial, is entirely consistent with French's testimony that he did not learn of the planned burglary until the day it was committed (Tr. 6394-6395).

We cannot overemphasize the importance of this inconsistency. The burden of Baron's testimony was that he was hired by Peter Limone to plan and execute a murder. For his story to have been credible, he must, on March 11, 1965, the day before the momentous event, have known what the strategy and who the principals would be. Roy French was Baron's key man; on him the success of the plan to kill Deegan would stand or fail.

At the trial Baron apparently knew this. He said he began talking to French on March 7 (Tr. 3300) and that, by March 11, French reported back to him that he was ready to participate in what was to be, for Deegan and Stathopoulos, a double-cross (Tr. 3317-3318). Had defense counsel at the trial been able to cross-examine Baron and Stathopoulos on the basis of Stathopoulos' earlier statement that French had not been asked to join the burglary until about noon on March 12, 1965, the day of the event, their testimony unquestionably would have been shaken.

b. In his testimony at trial, Stathopoulos claimed he saw at the scene of the murder a man run out of the alley with a gun in his left hand which was then shifted to his right hand. The report states:

> "'S' alledges [*sic*] that another man came running out of the alley carrying a black gun in his left hand and wearing a black coat, looked toward Broadway, and then at French."

This discrepancy is not nearly so insignificant as it might appear at first blush. At the trial, Stathopoulos identified the man coming out of the alley as Lewis Grieco (Tr. 4961). It would appear in retrospect that Stathopoulos at the trial did not know whether Grieco was left-handed or right-handed. A statement that he had seen the gun shifted from the left hand to the right hand would presumably cover either eventuality. If in fact it had been known to the defense that Stathopoulos had earlier placed the gun in the left hand of the man coming out of the alley, it might well have produced evidence that Grieco was right-handed and would not be carrying a gun in his left hand. Nor should we imagine that such a defense would be helpful only to Grieco. If the story told by Stathopoulos could be made to appear the recent fabrication that it undoubtedly was, the jury might have disbelieved not only his story but Baron's too.

c. At the trial, Stathopoulos testified that after the slaying, when he, a friend of his and Attorney Farese went to the Chelsea police station, only Mr. Farese entered, while Stathopoulos remained in his car (Tr. 4968-4970). In the report it states:

> "They then proceeded to the scene of the shooting where A. Farese in the presence of 'S' had conversation with Capt. Renfrew Chief of Det. for the Chelsea Police Dept. Capt. Renfrew asked Farese where he had been during all this happening. Farese inquired as to the whereabouts of Roy French and was told that French was not here. Capt. Renfrew asked Farese why he was asking about French. Farese told him that the delivery [?] man in the square [score] had told him of the event."

We of course do not know why Stathopoulos chose at the trial to conceal his presence during the conversation between

Captain Renfrew and Mr. Farese, or, on the other hand, why he made up a story to Officer Doyle on September 8, 1967, of being present during this conversation. Could it be that Stathopoulos said things himself in the course of this conversation which he would not wish to have proven either on cross-examination or by bringing Captain Renfrew as a witness? Or could it be that the conversation which Stathopoulos heard included statements by one or both of the participants that would contradict Stathopoulos' and Baron's versions of the slaying given at the trial?

Thus far, we have only been concerned with so much of the report as appears to be dated September 8, 1967. We have not yet considered Stathopoulos' statements to Officer Robson between June 22 and July 3, 1967.

We specifically call attention to four sentences in this part of the report.

(1) The report states:

> "Stathopoulos was with Roy French and Teddy Deegan and they had tried previously to bring French in, to get Shackleford to go along on the job, but Shackleford was in New Hampshire."

In its present form this sentence does not make grammatical or syntactical sense. It does make sense, however, if we change the verb "bring" to the gerund "bringing." The sentence then becomes consistent with Stathopoulos' story on September 8, 1967, that the decision to bring in Roy French was a last-minute one. But it also goes further. It explains why this decision was made at the last minute: *i.e.*, because French was a substitute for the person (Shackleford) whom Stathopoulos and Deegan would have preferred. In these circumstances, Baron's story about early contacts with French becomes

absurd. Baron never mentions Shackleford. If we assume that Baron through some intelligence network was able to gather information in advance as to whom Deegan was going to seek out for help in the burglary, his information should obviously have led him to Shackleford, not French, and it is Shackleford with whom he should have been negotiating.

(2) Again we quote the report:

> "When Stathopoulos [*sic*] heard the shots in the alley, he left the scene in the same type car as the hired killers had arrived in Stathopoulos [*sic*] stated that he actually saw Ronnie Cassesso [*sic*] with a gun in his hand that night and Romeo Martin. He did not see the others involved. . . ."

Here, obviously, is the ultimate challenge to the credibility of the story told by Stathopoulos at the trial. It will be remembered that at the trial the only defendants whom Stathopoulos identified at the scene of the crime were French and Grieco. He saw Grieco with a gun. His story to Officer Robson in June or July of 1967 was altogether different. He did not see Grieco at all. The man with the gun was Ronald Cassesso. The only other person whom he identified at the scene was Romeo Martin. We are not saying that the story Stathopoulos told to Officer Robson was true. The question whether it was or was not is immaterial. Under Massachusetts law the jury may consider that a witness, like Baron or Stathopoulos, who testifies falsely as to a material issue testified falsely as to all such issues. *Commonwealth* v. *Manning*, 1975 Mass. Adv. Sh. 1334, 1341, 327 N.E. 2d . Obviously, it constituted an inconsistent statement by Stathopoulos on a noncollateral issue; thus, under Massachusetts law if Stathopoulos had denied making it, the defense could have summoned Officer Robson

in rebuttal. Leach & Liacos, Handbook of Massachusetts Evidence (4th Ed.) p. 114, and cases cited.

2. The Stuart Affidavit.

The affidavit of Officer Stuart shows important communications to Officer Doyle. Doyle was a key assistant to the prosecutor in this case. At the trial the judge refused to apply his sequestration order to Doyle, who was permitted to sit with the assistant district attorney all through the proceedings (Tr. 3053).[13] Doyle had been present at an interview between Baron and Stathopoulos, and testified about that interview at the trial.

According to the Stuart affidavit, as early as March 14, 1965, two days after Deegan was killed, Detective Stuart interviewed one Edward Bennett, who reported (E-130) "that Baron had told him that Deegan was killed because he was friendly with the McLaughlin brothers and the Hughes brothers, enemies of a gang to which Baron was friendly." Shortly thereafter, Romeo Martin told a story of the killing, substantially the same as Bennett's (E-130). Martin also reported hearing from Baron the same reasons for Deegan's murder that Bennett had reported hearing. This information is, of course, wildly in conflict with the testimony given by Baron at the trial, wherein Baron's testimony was that Deegan was killed on the orders of Mr. Limone, whose alleged reasons had nothing whatever to do with the Hughes brothers or the McLaughlin brothers or Baron's friendships.

Officer Stuart also reported to Doyle on the basis of information that he had that Peter Limone, among others, was

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[13] This reference and all further references in this petition to the transcript are to the original transcript in the case in chief.

"innocent of the Deegan murder" (E-131). Doyle replied: "I don't care whether they are innocent or guilty of Deegan — if they're not guilty of that, they're guilty of plenty of other crimes." The affidavit does not say whether Mr. Stuart told Doyle the nature of the information upon which he based his conclusion. We assume, *arguendo*, that he did not. Since Mr. Stuart, however, was "assigned to the Intelligence Section of the Boston Police force" at the time he made his disclosure to Doyle, his conclusion could hardly be taken lightly.

It is uncontroverted that Doyle never made Stuart's statements to him known to any defense counsel.

In part this argument rests on the underlying hypothesis that this Court will apply the holdings of *Cochran* v. *Kansas*, *supra*, *Pyle* v. *Kansas*, *supra*, and *Williams* v. *Kaiser*, *supra* (see argument XI, A, *supra*) and accept the Stuart affidavit as true as well as the authenticity of the report attached to the Berman affidavit. We point out, however, that the Supreme Judicial Court has already ruled in effect that, even if authenticated, the report was not such exculpatory evidence as would entitled petitioners to a new trial because it was suppressed by the prosecution. The court stated in its opinion (360 Mass. at 578):

> "We have recently stated that 'the prosecutor's duty to disclose must be measured by the directness of the materiality of the . . . evidence in question to the defence taken together with the sheer volume of all the evidence in the hands of the prosecution.' See *Commonwealth* v. *Beneficial Fin. Co.* [360 Mass. 188,] 318 (a case where, of course, there was a much larger volume of potential documentary evidence than in the *French* case). Particularly is this true . . . with respect to a 'marginally useful item of evidence.' The sworn facts set out in Mr. Berman's affidavit do not establish that this alleged

> report, even if authenticated, was more than 'marginally useful in view of the exhaustive examination of Stathopoulos at trial or that persons investigating Deegan's murder had any substantial reason to rely on its accuracy, if they knew about it."

Petitioners recognize that the Stuart affidavit standing alone, if accepted as true, may not entitle the petitioners to a new trial because the prosecution suppressed evidence. They submit, however, that the suppression of the police report attached to the Berman affidavit, if authenticated, would entitle petitioners to a new trial on the principles of such cases as *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963); *Giles* v. *Maryland*, 386 U.S. 66, 98 (1967); and *Smith* v. *Florida*, 410 F. 2d 1349, 1350-1351 (5th Cir. 1969). They further submit that under settled due process principles the suppression of *both* the police report *and* the information in the Stuart affidavit so unquestionably requires a new trial that the opinion of the Supreme Judicial Court to the contrary cannot be justified on any grounds. Indeed, the Supreme Judicial Court apparently thought it best to dispose of petitioners' constitutional arguments in a footnote, saying (360 Mass. at 578, fn. 5):

> "These defendants contend that certain cases require, or tend to require, the production of directly exculpatory material and evidence in the possession of the prosecution. See e.g. *Giles* v. *Maryland*, 386 U.S. 66, 74-78, 82-84, 97 (see also dissent beginning at 102); *Barbee* v. *Warden, Md. Penitentiary*, 331 F. 2d 842, 844-847 (4th Cir.); *Smith* v. *Florida*, 410 F. 2d 1349, 1350-1351 (5th Cir.); *United States* v. *Miller*, 411 F. 2d 825, 830-833 (2d Cir.). See also *Mesarosh* v. *United States*, 352 U.S. 1, 10-14;

Brady v. *Maryland*, 373 U.S. 83, 87-88. It is not clear how these decisions (and others) deal with allegedly exculpatory, hearsay evidence principally useful for impeachment, where there has been shown no explicit defence request for such information and no prosecution frustration of defence efforts to obtain substantially relevant information. See *Link* v. *United States*, 352 F. 2d 207, 210-213 (8th Cir.); *United States* v. *Keogh*, 391 F. 2d 138, 146-149 (2d Cir.); *Rhinehart* v. *Rhay*, 440 F. 2d 718, 726-727 (9th Cir.). See also *United States* v. *DeLeo*, 422 F. 2d 487, 498-499 (1st Cir.). Suppression of significant and material evidence favorable to a criminal defendant, where a defence request reasonably directs the prosecution's attention to it (see the *Keogh* case, 391 F. 2d 138, 147 [2d Cir.]), obviously is improper. Much, however, depends on the particular circumstances and the nature, importance, and relevance of the allegedly suppressed evidence."

We may assume for purposes of this argument that the prosecutor's duty to disclose exculpatory documentary evidence is not absolute but is subject to a rule of reason which would take into account the volume of documentary evidence, the importance of the evidence, and the existence of a request for such evidence by the defense. In the *Giglio* case, *supra*, this Court, quoting from *United States* v. *Keogh*, 391 F. 2d 138, 148 (2d Cir. 1968), noted that the accused is not entitled to a new trial whenever the "combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict. . . ."

In the first place, the prosecution in the case at bar presented almost no documentary evidence at the trial. It can hardly be imagined that the failure of the prosecution to make

the police report available to the defense was due to the prosecution's being overwhelmed by an avalanche of documentary evidence.

In the second place, petitioners in the case at bar filed motions for exculpatory evidence prior to trial and these motions were denied. No exculpatory evidence was furnished, and virtually all motions for discovery were denied. *Cf. Moore* v. *Illinois*, *supra*, 793-794. To justify the suppression of exculpatory evidence because that evidence was not specifically requested is absurd; if the accused knew of the evidence, he would have less need for it. It may well be that in *Keogh*, *supra*, 142-143, the defense prior to trial should have seen the need for the F.B.I. report on Erdman's financial record and requested to see it; it is significant that in *Keogh* (140), even though there had been no such request, the Court of Appeals vacated the District Court's order and ordered an evidentiary hearing on the effect of the failure to make this report available to the defendant. In any event, there was no reason for the petitioners in the case at bar to believe that Stathopoulos had been talking to the police in June and July of 1967, much less that they had made a report of what he told them and that this report was grossly inconsistent with the evidence at the trial.

In the third place, this report was not merely important; it was the key to the whole case. We have already discussed in detail the wide discrepancies between the statements of Stathopoulos to the police in July and September, 1967, and the court's theory of the case as it was developed at the trial. Without repeating what has already been said, we emphasize that Baron's testimony was concocted on a theory that in January, 1965, after petitioner Limone offered him a "contract" to kill Deegan, Baron had begun immediate negotiations with Roy French, who on *March 11, 1965*, told Baron that he (French), Deegan and Stathopoulos were going to burglarize a finance company in Chelsea (Tr. 3317-3318).

Baron had supposedly arranged a double-cross with French to kill Deegan and Stathopoulos during the burglary. Stathopoulos' statements to the police in July show that this was impossible since French had not been asked into the Chelsea burglary until noon on *March 12, 1965*. French so testified at the trial (Tr. 6394-6395).

Counsel for petitioners had tried the entire case on the thesis that Baron was an unmitigated liar who had made up his entire story "out of whole cloth" in order to gain leniency for himself. They were unable to obtain, however, *any* extrinsic *independent* evidence that would damage Baron's credibility. Yet here was such evidence sitting in the hands of a police officer who assisted the prosecution all through trial. *Smith* v. *Florida*, 410 F. 2d 1349, 1350-1351 (5th Cir. 1969). In view of Baron's long and serious criminal record and the leniency which was being shown him in return for his testimony in this case, and in view of the fact that petitioners' convictions rest entirely on Baron's testimony, no one can rationally say that disclosure of the police report would not have resulted in a different verdict. And if only one aspect of the report was enough to shake Baron's story, it follows that the report, with its numerous discrepancies, together with Romeo Martin's statement to Officer Stuart on the real reason why Baron wanted Deegan killed, might certainly have resulted in petitioners' acquittals.

C. *On the Basis of the Baron Affidavit.*

We must begin by recognizing that Baron's position, when he executed his affidavit, was an obviously difficult one. To be balanced against whatever pangs of conscience told him that it was wrong to send innocent men to their deaths on false testimony (see *Patriarca* v. *United States*, 402 F. 2d 314,

318-319 (1st Cir. 1968), cert. den. 393 U.S. 1022 (1969)) were the obvious risks of a perjury prosecution in which conviction could carry a life maximum (Mass. G.L. c. 268, § 1), and the loss of government assistance that had proved so valuable in the past. *Patriarca*, *supra*. Furthermore, he could suffer these consequences and still not succeed in saving those whom his perjury had condemned.

Clearly, Baron's affidavit was given on the premise that the judge would hold an evidentiary hearing at which Baron would amplify his rather broad statements. The judge, however, refused to hold such a hearing. The question now is whether, in view of the *Cochran*, *Pyle*, and *Williams* cases, *supra*, requiring that the statements in Baron's affidavit be taken as true, the defendants are entitled to a new trial.

In paragraph No. 2 Baron states that he wishes to "recant certain portions of [his] testimony during the course of the . . . trial insofar as [his] testimony concerned the involvement of Henry Tameleo, Peter J. Limone, Joseph L. Salvati and Lewis Grieco in the killing of Teddy Deegan." The suggestion by the assistant district attorney that this testimony might be as trivial as a statement that Mr. Limone paid Baron $7,400 instead of $7,500 is not borne out by the record. Such a change would not amount to a recantation; to recant is "to withdraw or repudiate formally and publicly." Black's Law Dictionary (Deluxe 4th Ed.), p. 1433. Furthermore, Baron said that the testimony which he wishes to recant concerns "the involvement" of the four persons named. "Involvement" means "the state or fact of being involved" (Webster's Third New International Dictionary, p. 1191) and includes even the slightest tangency. See *Betcher* v. *Hay-Roe*, 429 Pa. 371, 375 (1968).

Paragraph No. 3 of the affidavit states that the testimony that Baron now proposes to offer will be "the whole trut

known to [him]." The obvious implication is that Baron's testimony at the trial was not the truth.

The Supreme Judicial Court noted (357 Mass. at 362): "Baron's testimony was of major importance." That may well be an understatement, for it is clear that, without his testimony, none of the defendants could have been convicted. A statement by Baron that he lied at the original trial about the involvement of four of the defendants can only mean that these defendants were not involved in the murder.

We recognize that the standards upon which new trials are granted for newly discovered evidence are not always in harmony with each other. Nevertheless, we submit that in a situation of this type, where the conviction obviously depended upon the testimony of one witness and that one witness filed an affidavit in which he makes it clear that his testimony was false as it concerned four people in a capital case, no civilized court has ever hesitated to grant a new trial. *Mesarosh* v. *United States*, 352 U.S. 1 (1956). See 8 Moore's Federal Practice (2d Ed.) § 33.05, 33-16. We submit that denial of a new trial in these circumstances would be an abridgement of the "fundamental principles" embodied in the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. *Palko* v. *Connecticut*, 302 U.S. 319, 328 (1937).

Conclusion.

For the reasons given a writ of certiorari should issue to review and revoke the judgment of the Court of Appeals.

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

No. 75-1336

LEWIS GRIECO, et al.,
PETITIONERS, APPELLANTS,
v.
LARRY MEACHUM, Warden, et al.,
RESPONDENTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. WALTER JAY SKINNER, *U. S. District Judge*]

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

David Berman for appellants.
Robert V. Greco, Assistant Attorney General, with whom *Francis X. Bellotti*, Attorney General, and *John J. Irwin, Jr.*, Assistant Attorney General, Chief, Criminal Bureau, were on brief, for appellees.

April 7, 1976

COFFIN, *Chief Judge*. These are six appeals from dismissals of habeas corpus petitions challenging the constitutionality of petitioners' convictions in the Massachusetts courts for crimes related to the 1965 murder of one Edward Deegan. The convictions were affirmed on appeal by the Massachusetts Supreme Judicial Court, *Commonwealth* v. *French*, 357 Mass. 356 (1970), and subsequent denials of motions for a new trial were also affirmed. *Commonwealth* v. *Cassesso*, 370 Mass. 570 (1971). The government's star witness at trial was Joseph Baron-Barboza who testified, in substance, that petitioners Tamaleo and Limone ap-

proached him to kill Edward Deegan in 1965, and that he enlisted the aid of petitioners Grieco, French, Cassesso, and Salvati, among others, to carry out this task. A further statement of the facts can be found in the reported opinions of the Massachusetts state courts. *French, supra; Cassesso, supra.*

The joint prosecution of the six defendants, now petitioners, for capital offenses occupied 50 days and resulted in 469 assignments of error. *French, supra,* 357 Mass. at 362 n. 2. After exhausting their state remedies, petitioners brought this habeas corpus action in federal district court presenting 90 items of claimed constitutional error in their trial. The district court found 88 of the asserted errors lacked evidentiary support in the record, were not shown to have resulted in prejudice to the petitioners, or were not of constitutional proportions. As to the remaining two assignments, the district court found that *Massiah* v. *United States,* 377 U.S. 201 (1964), did not compel a finding of constitutional error in the admission of the testimony of one Glavin against petitioner Cassesso. Second, the district court found, after an evidentiary hearing, that the practice of the prosecuting attorney at trial in submitting trial memoranda to the judge without providing copies to defense counsel did not violate due process in that the petitioner's counsel had acquiesced at trial, and in any event there was no showing of prejudice.

On appeal, substantially all of the 90 claims of error have been briefed and are presented for our consideration. Our review of a state court conviction is limited to searching for constitutional error. 28 U.S.C. § 2254(a). Therefore, we shall particularize only those issues which arguably rise to that threshold. The 90 claims can be divided into the following categories: (1) failure of the trial court to sever the trials of the six defendants, (2) denial of pre-trial dis-

covery, (3) objections to the selection and impartiality of the jury, (4) evidentiary rulings, (5) instructions to the jury, (6) misconduct by the trial court and prosecuting attorney, and (7) various allegations concerning the denial of directed verdicts and denial of motions for a new trial. Like the district court, we find that most of the issues presented do not rise to constitutional proportions. Consequently, we will discuss in detail only selected issues under categories (1), (4), and (6).

I. Failure of the Trial Court to Sever

Petitioner Limone contends that the trial court's refusal to sever the trials of the defendants created constitutional error under *Bruton* v. *United States,* 391 U.S. 123 (1968). He bases his claim upon the admission of testimony of Joseph Baron relating conversations between Baron and petitioners Tamaleo and Cassesso which tended to link Limone to the decision to kill Deegan.

A short discussion of the underpinnings of *Bruton* discloses the inappropriateness of this claim. *Bruton* is concerned with the prejudice inherent in the introduction of a confession made by one co-defendant which implicates another, non-confessing co-defendant. In the absence of an established exception to the hearsay rule, the confession could not be offered against the non-confessor. But in a joint trial of the two co-defendants, the same jury which decides the non-confessor's case has heard the confession, though it was not offered against him. The Court, in *Bruton,* held that limiting instructions, the normal means to insure that such inadmissible evidence is not considered by a jury, were insufficient to cure the extreme prejudice created by the co-defendant's confession. Therefore, the proper remedy would be to sever the trials of the defendants.

In this case, the statements at issue were, at most, admissions made by various of the petitioners in the course of a

conspiracy or joint criminal enterprise. In both Massachusetts, *French, supra,* 359 Mass. at 380, and in the federal courts, *United States* v. *Clayton,* 450 F.2d 16 (1st Cir. 1971), statements by co-conspirators made during the pendency and in furtherance of a criminal conspiracy are admissible against all conspirators as an exception to the hearsay rule. If, as the petitioner requests, the trials had been severed, the very same statements could have been offered against him at his separate trial, given a proper showing of conspiracy. The petitioner, accordingly, has not suffered prejudice because he was tried together with the other defendants. *Bruton* is inapplicable.

Petitioner's arguments resolve into a basic confrontation clause challenge to the co-conspirator exception to the hearsay rule. There is no merit in that claim. *Dutton* v. *Evans,* 400 U.S. 74 (1970). In a practical sense, moreover, the questioned testimony was of minimal importance when viewed against the remainder of Baron's testimony which overwhelmingly implicated Limone. Even if there were constitutional error in admitting this testimony, it appears to us as harmless error beyond any doubt. The other grounds asserted to support error in refusal to sever the trials — such as antagonistic defenses and conflicting trial strategies — have not been developed with any particularity, and have not been shown to have resulted in prejudice.

II. Evidentiary Rulings

Of some dozen challenges to evidentiary rulings, the only one worthy of discussion is the admission of certain testimony by one Glavin against petitioner Cassesso. Glavin, a prisoner serving a life sentence for an unrelated murder, had been approached by a fellow inmate at MCI, Norfolk, named Ventola. Cassesso was also incarcerated at the institution pending trial for complicity in Deegan's murder. Ventola offered Glavin $50,000 to confess to the murder of

Deegan for which Cassesso had been indicted. Glavin would be schooled in the details of Deegan's murder, and the money would be paid to a trustworthy attorney to be held for Glavin's family. Glavin, after this approach by Ventola,[1] reported the proposition to Agent Hanlon of the Worcester, Massachusetts, FBI office, a personal acquaintance. Hanlon told Glavin to speak with Cassesso as if he were going along with the plan. Cassesso, in the course of some three conversations, allegedly confirmed Ventola's offer, and with two others, added the requirement that Glavin kill a named person so that they would have "something on him".

Glavin testified to Cassesso's conversations with him at trial. These otherwise hearsay statements were presumably admitted as admissions of a defendant by conduct tending to show consciousness of guilt of past crimes. Cassesso challenges the testimony as elicited by the government while an indictment was pending in the absence of counsel, and claims that its admission was in violation of *Massiah* v. *United States, supra.*

The district court found that the factual situation in the present case and in *Massiah* had certain parallels; both involved post indictment incriminatory statements, made without the advice of counsel, admitted into evidence. It found, however, several distinctions. The first difference involves the position of the government agents in the two cases. Agent Hanlon, who instructed Glavin to pursue the matter with Cassesso, was employed by the federal government, and had no prior connection with the state prosecution of Cassesso for complicity in the murder of Deegan.

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[1] The district court states in its opinion that Glavin had spoken with Cassesso before approaching the FBI with the story. The petitioner contends that Glavin spoke with Cassesso only after his contact with the FBI. Under the resolution of the issues *infra*, this difference is not crucial. If Glavin had spoken with Cassesso before approaching the government, his testimony of the early conversations would raise no *Massiah* issues. *See Paroutian* v. *United States,* 370 F.2d 631 (2d Cir. 1967); *United States ex. rel. Baldwin* v. *Yeager,* 428 F.2d 182 (3d Cir. 1970).

We do not, however, find it dispositive that Hanlon worked for a separate branch of the government. But if the circumstances of this case were that neither Hanlon nor Glavin knew of the indictment pending against Cassesso, and inadvertently had been made aware of these incriminatory statements while pursuing other inquiries, we would be inclined to find that *Massiah* was not violated. *United States* v. *Garcia*, 377 F.2d 321 (2d Cir. 1967).

There is, however, a more substantial distinction between the statements in the case at bar, and those in *Massiah*. Massiah, after he was indicted and released on bail, made "several incriminating statements", 377 U.S. 202, during a conversation with Colson, a co-defendant. Unbeknown to Massiah, Colson had previously decided to cooperate with the authorities, and by prearrangement, the conversation was overheard, by means of a bugging device, by an FBI agent who testified to Massiah's admissions at trial. Cassesso's statements, on the other hand, were primarily uttered in the commission of another substantive offense, subornation of perjury, and were only incidentally admissible in his trial on the pending indictment.[2] Because of this distinction we find that Cassesso's Sixth Amendment right to counsel was not violated by Glavin's conversations with him, nor by the introduction into testimony in his trial for the murder of Deegan.

The Supreme Court has established that the pendency of an indictment does not immunize a defendant from accountability for statements made in the commission of another crime, even though made to a government agent, in the absence of counsel. *See United States* v. *Hoffa*, 385 U.S. 293

[2] *Massiah* also speaks of statements "deliberately elicited" by government agents. 377 U.S. at 202. To the extent that Agent Hanlon was investigating a separate substantive offense, he was not attempting to deliberately elicit statements incriminatory in relation to the Deegan murder charge. "Deliberate elicitation", however, is not required for a violation of *Massiah* in this circuit. *Hancock* v. *White*, 378 F.2d 479, 482 (1st Cir. 1967).

(1966); *accord, United States* v. *Missler*, 414 F.2d 1293 (4th Cir. 1969). And the use of a government informer, or otherwise legal eavesdropping, to obtain this evidence of another crime does not violate the Sixth Amendment right to counsel as long as the privacy between the accused and his counsel is not compromised. *See United States* v. *Hoffa, supra* at 304-09. It is clear, therefore, that the government's good faith acquisition of information concerning the attempted subornation of perjury through the use of Glavin as an informer did not violate Cassesso's right to counsel.

There still remains the novel question of whether the admission of Glavin's testimony at Cassesso's trial for complicity in the Deegan murder independently violated any of Cassesso's constitutional rights. In both *Hoffa* and *Missler, supra*, the contested testimony was introduced in the trial for the second substantive offense, and not in the trial of the charges in the indictment pending at the time of the conversations. Both cases suggest that the introduction of such testimony at the trial of the pending indictment would present serious Sixth Amendment questions.[3] We conclude, however, on the facts of this case, that the admission of Glavin's testimony was constitutionally permissible.

Exclusion of relevant, otherwise admissible testimony, is a remedy for past violations of the constitution. As there was no violation of Cassesso's constitutional rights in obtaining the information contained in Glavin's testimony, we can see no constitutionally required reason to exclude it from the trial in question. Had the government's intention been to obtain testimony against Cassesso for use at the trial for Deegan's murder, or had the statements of Cas-

[3] In *Hoffa*, the Court intimated that had Hoffa been convicted on the pending Taft-Hartley Act charges, Partin's conduct may have required reversal of the conviction. This suggestion, however, was based upon the proposition that Partin overheard defense strategy conversations between Hoffa and his attorneys.

sesso been innocuous except for their implication of consciousness of guilt of the prior crime, our decision might be different. The government, however, acted in good faith in investigating another crime. The fact that the new criminal activity also had a bearing on the consciousness of guilt of past crimes should not disable the government from taking protective measures. The defendant, moreover, was under no misapprehension that the statements he made could not be used against him at least in a trial for subornation. True, had Cassesso been informed that Glavin was cooperating with the authorities, he would not have made the incriminating statements. Had his counsel been present, he would have been advised to refrain — not because the statements would have shown a consciousness of guilt of complicity in Deegan's murder, but because his statements, themselves, were the operative acts of a separate criminal offense.[4]

The remaining alleged errors in the admission, or exclusion, of evidence do not rise to constitutional dimensions. An example is what counsel has termed "what may well be the most grievious single evidentiary error committed by the trial judge". This lay in the court's refusal to allow Glavin, who had testified that Cassesso had told him that he would pay the $50,000 for admitting to Deegan's murder and would also arrange for Glavin's parole or commutation, to be asked whether he had made prior inconsistent statements. In fact, counsel had obtained grand jury minutes which revealed that Glavin had testified that Cassesso had said that "the office" would pay the money and attend to the parole. The court refused the use of the minutes, unless they had been authenticated in the usual course — an effort

[4] It is noted, moreover, that had Cassesso made these proposals to his counsel, the attorney-client privilege probably would not have excluded his counsel's testimony to such conversations. The privilege generally does not extend to confidences concerning present and future criminal activity. *See Commonwealth* v. *Dyer*, 243 Mass. 472, 505-06 (1923); *see generally United States* v. *Friedman*, 445 F.2d 1076, 1085-86 (9th Cir. 1971).

which was not made. Whether or not Massachusetts law requires that the prior inconsistent statement be so proven in cross-examination is beside the point. The point is that such error falls far below the constitutional level cognizable in habeas corpus proceedings.

III. Misconduct of Court and Prosecutor

The one issue as to which the district court held an evidentiary hearing arose from the practice at trial of the prosecuting attorney in furnishing the court, but not opposing counsel, with trial memoranda. Counsel for petitioners, the district court and we share the opinion that *ex parte* communications shadow the impartiality, or at least the appearance of impartiality, of any judicial proceeding. And we agree with petitioners that such conduct may, in some circumstances, constitute a deprivation of due process of law. *Cf. Haller* v. *Robbins*, 409 F.2d 857 (1st Cir. 1969). But the district court carefully reviewed the trial record, and found, after the evidentiary hearing, that defense counsel, with full knowledge, acquiesced in the practice, "either by prior explicit agreement or by their conduct at the trial". As the matter was not presented to the trial court for correction, the failure to object to the practice constitutes a waiver, and may amount to a deliberate bypass of the state forum in presenting this claim. *See Fay* v. *Noia*, 372 U.S. 391 (1963). *But see Humphrey* v. *Cady*, 405 U.S. 504, 516-17 (1972).

In any event, the practice of submitting *ex parte* trial memoranda, although meriting censure, is not a per se violation of petitioners' due process rights. *Cf. Glynn* v. *Donnelly*, 485 F.2d 692 (1st Cir. 1973). The district court found that the petitioners were unable to point to specific prejudice suffered as a result of this practice. Petitioners contend that the offending memoranda contained statements of expected evidence that were not later supported by testimony. Some of these statements, they claim, may have been

extremely prejudicial as a sample brief detailed a plan to kill the wife of one of the petitioners, and expounded the petitioners' connection with organized crime.[5] But the district court found that these statements were no worse than an opening statement which promised more than the government was subsequently able to produce. Finally, and most significantly, the memoranda were submitted to a judge presiding in a jury trial, and not to the trier of fact. *Compare United States* v. *McFadden*, 63 F.2d 111 (7th Cir. 1933). In the absence of any showing that the memoranda infected the fact-finder's determination of the issues at trial, we hold that the challenged practice did not violate the petitioner's rights to due process of law.

The remaining allegations against the judge and prosecutor concern some eight instances of claimed overreaching by the court, and an equal number of instances of misconduct by the prosecutor. Given the length, complexity, and intensity of the trial, it is not surprising to find evidence of occasional lapses into ill temper. But we do not find any evidence of misconduct, singly or collectively, which was so egregious as to taint the essential fairness of the trial.

IV. Remaining Issues

Petitioners attack the denials of a wide variety of pretrial discovery motions, alleging that they constituted a denial of due process of law. We have reviewed the challenges and find them insufficient to establish constitutional violations. A majority of the claimed errors are matters committed to the discretion of the trial court under Massachusetts law, e.g., requests to inspect scientific evidence,

[5] The trial briefs were not available in the district court. A search of the Massachusetts court records did not reveal them, and the prosecutor could only find one partial sample memorandum in his personal files. The prosecutor, however, testified that the sample corresponded to his memory of the trial briefs.

requests for witnesses' grand jury testimony,[6] requests to interview witnesses held in custody, and the request for names of prospective witnesses. Their denial does not constitute constitutional error. *E.g., Moore* v. *Illinois*, 408 U.S. 786, 795 (1972). Other requests were denied because they were not specific enough, like the motion for evidence illegally obtained, or because they were forwarded at an improper time. For example, the motion to disclose exculpatory evidence in advance of trial was denied because *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963) does not compel extensive pre-trial discovery of exculpatory evidence within the prosecution's control. *See United States* v. *DeLeo*, 422 F.2d 487, 498 (1st Cir. 1970). Much the same can be said for the refusal to compel disclosure of the inducements offered government witnesses. All witnesses were subjected to vigorous cross-examination, and the motion to compel disclosure was not repeated at the end of the cross-examination. Other issues in the pre-trial discovery area do not merit comment.

Petitioners allege that they were tried by a constitutionally defective jury because outside influences infected the jurors' impartiality. First, the trial court accepted the guilty plea of Joseph Baron on the first day of jury selection. Petitioners argue that the timing of the guilty plea maximized the possibility of prejudice and presumptively influenced the jury against the remaining co-defendants. There were, however, good reasons to accept Baron's plea at that time,[7] and the trial judge took precautions to minimize the publicity of the plea. The circumstances of this case are not those in which there was inherently prejudicial

[6] In 1974, the Massachusetts Supreme Judicial Court decided, as a matter of state law, that requests for witnesses' grand jury testimony should be allowed. *Commonwealth* v. *Stewart*, 1974 Mass. Adv. Sh. 519. This ruling is not retroactive. In the instant case, the trial judge reviewed the grand jury testimony in camera, and fowarded one inconsistency to the defense.

[7] The most pressing reason put foward by the prosecution was the fear that Baron would demand to take part in the jury selection for the joint trial.

publicity that so saturated the community that it can be presumed that the jurors were biased thereby, *see Sheppard* v. *Maxwell,* 384 U.S. 333, 363 (1966), and there has been no showing of actual prejudice. The other outside influence claimed involves a government witness, who about six months previous to the trial, had lost a leg in an explosion from a bomb activated by the ignition of his automobile. At the time of the bombing numerous press stories attributed the act to the underworld. Noting that the publicity was six months old, the trial judge refused to poll the jury concerning their memory of the press accounts. This claim of improper influence on the jury is too insubstantial and too speculative to fairly raise a constitutional issue. Petitioners' attack on the jury selection process is not of constitutional dimensions; there is no showing that the jury did not represent a fair cross-section of the community, or that members of a specified group were systematically excluded from jury service.

The court's instructions were attacked in several particulars. We find no constitutional substance in any of the criticisms of the instructions. There was no shifting of the burden of proof as to conspiracy, or as to alibi. Nor was there any premature or excessive pressure on unanimity when the court gave at the outset instructions similar, but not identical, to those in *Commonwealth* v. *Tuey,* 8 Cush. 1, 203 (1851). While the court, in our opinion ill-advisedly, did not give a "close scrutiny" instruction as to accomplice testimony, *see United States* v. *House,* 471 F.2d 886, 888 (1st Cir. 1973), we recognize that Massachusetts law does not require it. We cannot find constitutional error here. Other issues relating to instructions do not warrant comment.

As to the issue of sufficiency of the evidence, raised by the motions for directed verdicts, we are mindful of our standard of review in habeas corpus actions from state court

convictions. The writ can be granted only if there is such a void of evidentiary support as to amount to a denial of due process. *Crow* v. *Eyman,* 459 F.2d 24, 25 (9th Cir. 1972). No such defect is present here. Finally, we see no error in the state court's denial, without prejudice to submit further affidavits, of the motion for a new trial. *See Commonwealth* v. *Cassesso, supra.* The three affidavits, even if their allegations should be taken as true, did not contain information so compelling that the court exceeded its discretion, and consequently denied the petitioners due process of law, in denying the motions. *Compare Pyle* v. *Kansas,* 317 U.S. 213 (1942).

Affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LEWIS GRIECO, Petitioner,	•	
v.	•	Misc. Civil No. 74-3-S
LARRY MEACHUM, Respondent.	•	
RONALD A. CASSESSO, Petitioner,	•	
v.	•	Misc. Civil No. 74-4-S
DOUGLAS VINZANT, Respondent.	•	
JOSEPH SALVATI, Petitioner,	•	
v.	•	Misc. Civil No. 74-5-S
DOROTHY CHASE, Respondent.	•	
PETER J. LIMONE, Petitioner,	•	
v.	•	Misc. Civil No. 74-6-S
DOUGLAS VINZANT, Respondent.	•	
HENRY TAMELEO, Petitioner,	•	
v.	•	Misc. Civil No. 74-7-S
DOUGLAS VINZANT, Respondent.	•	
WILFRED R. FRENCH, Petitioner,	•	
v.	•	Civil Action No. 74-1216-S
DOUGLAS VINZANT, Respondent.	•	

Memorandum and Order.

July 10, 1975.

SKINNER, D.J.

These six petitions for writs of habeas corpus arise out of a joint trial, in the Superior Court of Massachusetts, of indictments charging the petitioners French and Grieco with the murder of Edward Deegan, and the petitioners Tameleo, Limone, Cassesso and Salvati as accessories before the fact. All were also charged with conspiracy to murder both Deegan and Anthony J. Stathopoulos. They were found guilty and are all presently serving life sentences. An appeal from their convictions was taken to the Supreme Judicial Court and the judgments of the Superior Court were affirmed. *Commonwealth* v. *French*, 357 Mass. 356 (1970). Denial of motions for a new trial was also affirmed. *Commonwealth* v. *Cassesso*, 276 N.E. 2d 698 (1971).

At a pre-trial conference, counsel for the petitioners represented that they were prepared to present testimony outside the record on only one issue, i.e., the submission to the judge of the Superior Court during trial of trial briefs by the Assistant District Attorney, without copies being furnished to defense counsel. All other issues were submitted on the record, the transcript of the Superior Court trial and briefs of the parties.

The trial lasted fifty trial days, twenty-two of which were spent in the selection of jurors. The stenographic record consists of 7,555 pages, of which 2,749 cover the selection of jurors and 4,806 pages cover the trial itself. The petitioners raise ninety separate grounds which they claim either severally or in combination require the issuance of the writ of habeas corpus on constitutional grounds. Petitioners' counsel presented these 90 issues in an ingenious tabular form, which was of considerable assistance to the court.

Only two of these issues merit extended discussion, the first because the court is required to make findings of fact based on the evidentiary hearing. That concerns the allegation that petitioners were deprived of due process and, in particular, their right to the adequate assistance of counsel because the Assistant District Attorney filed a series of trial briefs without giving copies to defense counsel.

At the hearing before me, Mr. Zalkind, who had been the Assistant District Attorney prosecuting the case, testified that at the start of each trial day, he would submit a two or three page brief outlining the testimony that he expected to offer during the day, with a brief exposition of the legal and evidentiary questions that he anticipated this testimony would generate. He did not give copies to any defense counsel. He testified that before the trial began, at an unrecorded lobby conference, the judge and all counsel agreed to a plan under which counsel for both prosecution and defense could submit trial briefs to the court without giving copies to the other side. The reason for this was supposed to have been the extreme security surrounding the trial, and the desire of all parties to keep the court informed without tipping their hands to the opposition.

He further testified that defense counsel knew about his submission of trial briefs, because he submitted them to the clerk in open court in plain sight. He testified further that one or more of the defense attorneys had asked for copies on these occasions, but that he had refused to give them.

Mr. Zalkind testified that he had searched both the files of the District Attorney and his personal files for copies of these trial briefs, but he found none. He did find a carbon copy of what appears to be a fifteen-page trial brief. Mr. Zalkind says that this is not a copy of anything which he submitted,

but is the equivalent of a compendium of the briefs which he did submit over a period of several days and is typical in form and content of those he did submit.

All of the surviving defense counsel, Messrs. O'Donnell, Balliro, Chisholm, Stanziani and Paris testified that they had no memory of any such lobby conference as was described by Mr. Zalkind. They testified that they had no knowledge of the submission of briefs by Mr. Zalkind, and that they never would have consented to the submission of briefs by the prosecutor without copies being furnished to them. Mr. Balliro testified that he learned about the trial briefs late in the trial and was "outraged."

On the one hand, it is hard to believe that defense counsel would have agreed to dispense with copies of prosecution briefs, particularly where the practice of providing copies to parties is such an established practice in the Superior Court. On the other hand, it is odd that Mr. Balliro's outrage does not appear anywhere in the record, in a case characterized by interminable and often acrimonious colloquies among counsel and the court.

The transcript is instructive. On the twenty-fourth day of trial, Transcript p. 2842, the Assistant District Attorney referred to "The Commonwealth's trial brief that has been submitted to this Court." No defense counsel expressed surprise or asked for a copy at that time.

Later, on the twenty-sixth day of trial, the Assistant District Attorney, at the bench, summarized expected testimony of a witness. "As your Honor knows," he said, "I have already specified basically all of these things in the brief that was submitted to the Court."

The following bizarre colloquy ensued:

> "MR. CHISHOLM: I didn't get a copy of the brief, your Honor.

MR. STANZIANI: I didn't get a copy of his brief.

THE COURT: Of course not. I asked you for a copy of a brief and didn't get one.

MR. CHISHOLM: You didn't ask me.

MR. STANZIANI: I wasn't asked, your Honor.

THE COURT: I asked all of you for a brief. I am asking now. Give me a brief of what you have on your side —

MR. STANZIANI: I am going to take exception to those requests at this stage of the proceedings.

Exception No. 304

THE COURT: I have asked for briefs, all briefs, for all possible questions that may arise, with the citation, so I can look them up. That's all it is.

MR. STANZIANI: I think, your Honor — let the record show that I have never been requested of any brief. Forgive me if you think you have, but —

THE COURT: You may have misunderstood me.

MR. STANZIANI: I have never been asked for a brief, but, more than that, notwithstanding the same, I take exceptions to whatever the Court rules that we should do at this position of the trial, because we should not be required to file a brief.

Exception No. 305

THE COURT: All right. I am going to ask you now to give me a written statement of any law that may be involved so I can look it up, and that's all, ***and it will be kept by myself.*** Now, you don't have to do it, because a defendant doesn't have to say anything, and that's why I didn't press it, and whatever he said — I haven't seen

anything except what I heard was his opening. That's about all that I know — was his opening, where he talked with Limone and, you know, what I heard. That's all." [Emphasis supplied.]

This lends support to Mr. Zalkind's testimony. In any case, it is clear that defense counsel were put on notice that Zalkind had submitted a trial brief to the court as early as the twenty-fourth day of the trial, i.e., the second day after the jury was finally sworn, and again two days later. No objections were made to the practice or exceptions taken. Even the comments of Messrs. Chisholm and Stanziani above quoted hardly present the issue to the trial court for correction. I find and rule that defense counsel acquiesced in this practice, with full knowledge of it, either by prior explicit agreement or by their conduct at the trial.

I recognize that in making this finding, I must disregard the testimony of several experienced members of the bar. I do so not because of any doubts as to their veracity and integrity as members of the bar, but because I doubt their memory, nearly seven years after the event, of a relatively minor aspect of a trial otherwise full of considerable drama and tension. The transcript indicates that they had a lot more to worry about at the time than Mr. Zalkind's trial briefs.

The practice of submitting any material to a judge without copies to opposing counsel merits hearty disapproval. It is a very bad practice, and at least so far as the record shows, there was no justification for an exception in this case. Given the degree of acquiescence described above, however, the adoption of this practice does not constitute such a violation of basic rights as to warrant the grant of the writ of habeas corpus, absent positive evidence of substantial prejudice.

The petitioners' assertion that they were prejudiced because there were statements of expected evidence that were not later supported by testimony is without merit. Even if the memorandum had been addressed to the trier of fact, it would be no worse than an opening statement which promised more than the Government was subsequently able to produce. In any case, the offending memoranda were submitted to the judge, who was not the trier of fact, and the possible prejudice was remote. Assuming that the fifteen-page carbon copy in evidence is representative of the trial briefs submitted by the prosecution, they must be counted as modest efforts in terms of exposition of the law. There is little argued in it that could not have been anticipated by these seasoned defense counsel, nor that would not have been well known to the experienced judge who presided at the trial. I find that no substantial prejudice resulted to the petitioners from this impropriety.

The other matter requiring discussion is the testimony of Robert Glavin. In November of 1967, Glavin was serving a life sentence at MCI, Norfolk for an unrelated murder. After the indictment of the petitioners, he was approached by Cassesso, who was also in custody at Norfolk, first through an intermediary, and then by Cassesso in person with the following proposition:

Glavin was to confess to the murder of Deegan. Fifty thousand dollars would be paid to some trustworthy attorney to be held for the benefit of Glavin's family. Glavin would be schooled in the details of Deegan's murder. Glavin would also be required to murder a man named McElaney (presumably another inmate at Norfolk) so that Cassesso and his associates "would have something on him."

This proposal was unfolded in the course of a number of meetings with Cassesso and two other inmates. Glavin's testimony as to these events was admitted against Cassesso only.

The problem arises because shortly after his first meeting with Cassesso, Glavin reported the initial proposition to Agent Hanlon of the FBI. (Hanlon was assigned to the Worcester office of the FBI, and was contacted by Glavin because of previous acquaintance. Hanlon had no connection with the investigation or prosecution of the Deegan murder, and did not testify at the trial.) He was told by Agent Hanlon to continue the talks with Cassesso, to pretend to go along with the plan and to report future conversations to the FBI. In return, the FBI would attempt to protect Glavin and his family from reprisals. Glavin agreed and did report all future conversations to the FBI.

The essence of the plan was made known to Glavin before he talked to Hanlon, but he was not clear as to how much of the details he learned before he talked to Hanlon and how much after.

Petitioner Cassesso objected to the admission of this evidence and appealed the adverse ruling to the Supreme Judicial Court. He asserts that the admission of this evidence deprived him of a constitutional right not to be interviewed after indictment by an agent of the police except in the presence of counsel, or at least only after having been advised of his right to have counsel present, relying on *Massiah* v. *United States*, 377 U.S. 201 (1964).

Petitioner Cassesso asserts that there is no distinction between the conversation of Glavin and Cassesso and those of Massiah and Colson. Massiah, after he was indicted and released on bail, made "several incriminating statements" during the course of a conversation with Colson, a co-defendant. Unbeknown to Massiah, Colson had previously decided to cooperate with the FBI, and by prearrangement, the conversation was overheard by an FBI agent by means of a bugging device planted in Colson's car.

There are certainly parallels. In each case an incriminating post-indictment statement of a defendant, made without the presence of counsel or advice as to the right of counsel, was admitted in evidence against him. In each case, at least some of the statements were made to a person who had previously agreed to report them to a law enforcement agency.

The opinion in Massiah (p. 206) speaks in terms of statements "deliberately elicited" from the defendant. Here the conversation was initiated and pursued by Cassesso. In this circuit, however, deliberate elicitation is no longer necessary to render the statement inadmissible. *Hancock* v. *White*, 378 F. 2d 479, 482 (1 Cir. 1967), citing *McLeod* v. *Ohio*, 381 U.S. 356 (1965). This rule is not followed in other circuits. Cf. *United States* v. *Garcia*, 377 F. 2d 321 (2 Cir. 1967),

There are a number of distinctions, however, between this case and *Massiah*:

1. The statements attributed to Cassesso do not relate to the crime itself. They relate to a course of conduct undertaken by Cassesso, i.e., his selection of and approach to Glavin for the purpose of suborning perjury, obstructing justice and inciting to murder. It is the course of conduct which is incriminating. It is an admission by contemporaneous conduct, rather than by a verbal recitation of past events. *Massiah* and its progeny prohibit the introduction in evidence of the latter form of admission, but not the former.

2. The essentials of Cassesso's proposal were made known to Glavin *before* he contacted Hanlon. *Paroutian* v. *United States*, 370 F. 2d 631 (2 Cir. 1967).

3. Hanlon was not charged with the investigation or prosecution of the Deegan murder case. Hanlon's involvement was completely fortuitous, the result of prior acquaintance with Glavin. Cf. the position of Agent Quinones described in *United States* v. *Garcia*, 377 F. 2d 321 (1967).

The Supreme Judicial Court's discussion of this aspect of the case at 357 Mass. 356, 386-387 illuminates the policy considerations in favor of the admission of this testimony. While I would hesitate to apply the concept of estoppel to the invocation of constitutional rights, the court nevertheless fairly exposes the anomaly of excluding this testimony.

I conclude that the admission of Glavin's testimony did not violate the rule established in *Massiah* or any other consitutional right of Cassesso or any other petitioner.

The other eighty-eight grounds asserted by the petitioners fall into three categories: (1) frivolous or based on a misreading of the record, (2) correct legal statements unsupported by any evidence of actual prejudice, and (3) errors of law and procedure which are not of constitutional proportions and did not affect the substantial fairness of the trial. The principal issues were discussed in detail in *Commonwealth* v. *French*, 357 Mass. 356, the appendix thereto, pp. 399-406, and *Commonwealth* v. *Cassesso*, 276 N.E. 2d 698 (1971). The resolution of these issues by the Supreme Judicial Court was consistent with federal constitutional requirements, and need not be repeated. The petitioners certainly did not get a perfect trial, but they did get a fair one in constitutional terms. That is all they were entitled to.

The petitions in all of these cases must be DISMISSED.

WALTER JAY SKINNER,
United States District Judge.

COMMONWEALTH *vs.* WILFRED ROY FRENCH.
(and five companion cases [1]).

Suffolk. January 5, 1970. — May 4, 1970.

Present: WILKINS, C.J., CUTTER, KIRK, SPIEGEL, & REARDON, JJ.

Practice, Criminal, Trial of defendants together, Disclosure of evidence, Newspaper article, Argument by prosecutor, Remark by judge, Remark by counsel, Charge to jury, Discretionary control of evidence, Capital case, Disclosure of prospective witnesses, Access to witnesses, Fair trial, Plea of codefendant, Deliberation of jury. ***Evidence***, Admissions and confessions, Of conspiracy, Acts and declarations of conspirator, Common criminal enterprise, Res gestae, On cross-examination, Relevancy and materiality, Cumulative evidence, Attorney-client privilege, Prior inconsistent statement, Judicial discretion, Testimony of accomplice, Presumptions and burden of proof, Prior conviction, Credibility of witness. ***Constitutional Law***, Confrontation of witnesses, Admissions and confessions, Assistance of counsel. ***Statute***, Retroactive statute. ***Error***, Whether error harmful. ***Entrapment. Accessory. Jury and Jurors. Homicide. Conspiracy. Pleading, Criminal***, Bill of particulars. ***Witness***, Credibility.

At a joint trial against six defendants on murder charges and conspiracy charges, there was no error under *Bruton* v. *United States*, 391 U. S. 123, in the denial of motions by them, respectively, during the trial for severance based on the admission of certain out-of-court statements alleged to violate the right of cross-examination secured by the confrontation clause of the Sixth Amendment of the United States Constitution, where it appeared that no defendant confessed, that four defendants took the stand, and that the statements were originally limited in their personal application and did not contain charges against defendants not present when the statements were made sufficiently definite to require severance. [371–372, 375]

St. 1968, c. 721, § 2, inserting § 2A in G. L. c. 278, and effective only after completion of a certain trial together of capital cases and of conspiracy cases, was not retroactive so as to have required separate trials of the capital cases and the conspiracy cases. [375–376]

Severance of trials of several defendants indicted on capital charges and conspiracy charges was not required because of the disparity at a joint trial between the aggregate number of peremptory challenges to which the Commonwealth would be entitled and the number of peremptory challenges to which each defendant would be entitled [376];

[1] The other defendants are Lewis Grieco, Henry Tameleo, Joseph L. Salvati, Ronald Anthony Cassesso, and Peter Joseph Limone.

or because the defendants might assert antagonistic defences or use different trial strategy. [376]

There was no abuse of discretion at a long joint trial of indictments against several defendants in permitting the trial to continue after frequent clashes between participants in the trial and admonitions of counsel by the judge. [376–377]

Upon indictments for serious offences, there was no error in a denial of motions by the defendants for access to the grand jury minutes in advance of trial. [377]

There was no abuse of discretion at the trial of indictments in denial of motions for the grand jury minutes of the testimony of a trial witness where the motions were made at the close of his direct examination and before certain testimony on cross-examination relied on by the defendants as showing a "particularized" need for the minutes, and the motions were not subsequently renewed after such testimony on cross-examination [377–378]; or in denial of motions for the grand jury minutes of testimony of another trial witness where the motions were not adequately pressed after the judge had examined the minutes and the defendants did not show prejudice [378].

At a joint trial of defendants indicted for conspiracy, where it appeared that the central figure of the conspiracy testified as to conversations he had had with, and admissions made to him by, each defendant, and that at the end of the direct testimony of that witness the conspiracy had been adequately shown, out-of-court statements made by any defendant in furtherance of the conspiracy were then admissible against all defendants, although particular defendants had not been present when statements incriminating them were made. [378–379]

At the trial of a defendant as an accessory before the fact to a murder and for conspiracy to murder, where the judge in his charge stated that he had found sufficient evidence of a conspiracy "for the consideration of the jury" and that anything any member of the conspiracy did or said in furtherance thereof bound all of the conspirators, there was no merit in a contention by the defendant that out-of-court statements by his coconspirators should be applied only to the conspiracy indictments against him, where the evidence of a common enterprise to murder went beyond mere conspiracy. [379–380]

With respect to testimony of a conspirator given at a joint trial of defendants on murder charges and conspiracy charges before a finding of conspiracy or common enterprise would have been warranted, in which the witness told of conversations he had with defendants, no prejudice to any defendant resulted where the judge adequately limited the admissibility of many such conversations to the particular defendants with whom the witness conversed, and, as to his conversations concerning which no limiting instructions were given, some of such conversations were completely harmless, some were admitted without adequate exception, and some were admitted without any request for limiting instructions. [380–382]

At the trial of capital cases and conspiracy cases, any error in allowing a conspirator to state on direct examination that he would not have

proceeded with the criminal plans if a certain defendant had not authorized him to do so was harmless where the witness had so told that defendant and the statement added little to other evidence. [382]

At the trial of indictments arising out of a murder and a conspiracy to murder the victim and a conspiracy to murder a companion of the victim, testimony by the companion as to his talks with the victim when none of the defendants was present was erroneously admitted as res gestae, but no prejudice resulted since the talks were in large part consistent with other relevant testimony properly admitted; likewise, no prejudice resulted from testimony by the companion of his conversations with the central figure of the conspiracies after the conspiracies had ended, which were admitted to contest any suggestion of recent contrivance or were largely irrelevant. [382–383]

At the trial of indictments arising out of a murder and a conspiracy to murder the victim and a conspiracy to murder a companion of the victim, certain cross-examination of a detective in the District Attorney's office called by a defendant as his own witness was appropriate to rebut any inference from the detective's direct examination that testimony of the companion had been suggested in part by a coconspirator of the defendant after the conspiracies had ended. [383–384]

At the trial of indictments as accessory before the fact to murder and for conspiracy to murder, there was no error under *Massiah* v. *United States*, 377 U. S. 201, in the admission of testimony by a prisoner that after the defendant had been indicted an intermediary of the defendant "told" the prisoner to confess falsely to the murder and threatened his life if he did not, whereupon the prisoner went to the F.B.I. and at its suggestion talked with the defendant about the murder and pretended to go along with the proposal of the false confession in order "to get . . . information for the F.B.I." where the prisoner's talks with the defendant were largely cumulative of what he had already been told by the intermediary and the prisoner merely allowed the defendant to continue his criminal efforts and reported them without any entrapment. [386]

At a joint trial of defendants indicted as principals in, or accessories before the fact to, a murder and for conspiracy to murder the victim, where the judge instructed a witness not to use the words "office," "Cosa Nostra" or "they" in describing the persons responsible for, or connected with, a proposal that he falsely confess to the murder, and no individual was described as a member of the "office," there was no merit in a contention by the only defendant against whom the witness made a charge by name that such instruction unduly restricted his efforts upon cross-examination to show that the witness's testimony was false or inaccurate. [387–389]

At the trial of indictments against defendants who were in custody for the crimes alleged when the automobile of an attorney representing an accomplice coöperating with the government authorities was bombed, and who were not shown to have been responsible for the bombing, there was no error, when the attorney appeared to testify almost six months after the bombing, in a refusal to have the jury

polled to determine whether they had a memory of the bombing from news accounts. [389–390]

Reference by the judge in his charge at the trial of indictments to certain testimony as being the testimony of a named witness, whereas it was the testimony of another witness, was harmless where no exception was saved by any defendant and apparently counsel were not confused. [390–391]

At the trial of indictments for being an accessory before the fact to murder and for conspiracy to murder the victim and for conspiracy to murder a companion of the victim, testimony of the central figure of such conspiracies, and of a second witness indicating consciousness of guilt on the part of the defendant, warranted an inference that the defendant adhered to both enterprises to kill and furthered them by encouraging, and perhaps ordering, the first witness to go forward with them, and warranted a conclusion that the defendant was guilty upon all indictments. [391–392]

At the trial of indictments for being an accessory before the fact to murder and for conspiracy to murder the victim and for conspiracy to murder a companion of the victim, testimony of a conspirator warranted findings that the defendant initiated the plan and paid for the murder and was guilty upon all indictments. [392–393]

Evidence warranted findings that a defendant indicted for being an accessory before the fact to murder and for conspiracy to murder the victim and for conspiracy to murder a companion of the victim participated in both plans to kill, received pay for his work in connection therewith, and was guilty upon all indictments. [393]

There was no prejudice at the trial of indictments in a comment by the prosecutor on the failure of the defendants to call a certain witness who was available to the Commonwealth as well as to the defendants, where the judge explained to the jury that the comment was justified because the defendant's attorney had said that he was going to call the witness but did not do so. [393–394]

Any prejudice from a comment by the judge, in the middle of a long trial of indictments against several defendants, that defence objections had been unduly frequent, was adequately cured in the charge. [394]

The record of a protracted trial of indictments disclosed no justification for a contention by a defendant that the cumulative effect of alleged "disparaging" and "intemperate" comments by the judge about defence counsel denied that defendant a fair trial. [395]

The charge at the trial of indictments with respect to testimony of an accomplice of the defendants was not inadequate in that the judge did not instruct that such testimony must be "received with suspicion and acted upon with great caution." [395–396]

At the trial of indictments, the judge properly did not charge that the testimony of an attorney should be viewed with caution because the witness might conceivably have been found to have been an accessory after the fact. [396]

At a joint trial of several defendants on conspiracy, murder, and accessory indictments arising from the same events, there was no abuse of

discretion on the part of the judge, when a particular defendant rested at the close of the Commonwealth's case and his motion for a directed verdict was denied, in requiring that defendant and his counsel to continue in attendance at the trial and in receiving, after stating that he would receive, evidence against that defendant brought out through the witnesses of other defendants. [396–397]

At a joint trial of several defendants convicted on capital charges, where testimony from key witnesses before the jury for long periods was credible and warranted the verdicts returned, although three of such witnesses had criminal records and incentives or motives or self-interest behind their testimony, and a fourth witness understandably might have entertained hostility toward two defendants, nothing in the record indicated any reason for this court to exercise any of its powers under G. L. c. 278, § 33E, as amended by St. 1962, c. 453. [397–398]

It was within the discretion of the judge in a criminal case to deny motions for access to police reports. [399]

The judge in a criminal case was not required to conduct a public opinion poll of the community in order to determine whether the defendant could receive a fair trial. [400]

No abuse of discretion or prejudice resulted in a criminal case involving several defendants where the judge accepted a plea of guilty by one of the defendants before the selection of a jury to try the other defendants. [400]

At a criminal trial for serious offences, there was no abuse of discretion in excusing certain veniremen on the basis of the judge's observation of their capacity and suitability intelligently to perform the duties of jurors [400]; a public school teacher was not precluded from serving as a juror although he was exempt from service [400]; and a State employee, a director of social services, was not disqualified for service as a juror by bias [400].

An attorney for a defendant in a murder case was not barred by the attorney-client privilege from testifying that he observed blood on the clothing and shoe of that defendant at a police station shortly after the commission of the murder. [402]

At a criminal trial of several defendants in which the testimony of a certain witness was admissible only against one defendant whose counsel had cross-examined the witness, there was no error in refusing to allow counsel for another defendant to cross-examine him. [402]

There was no error at a criminal trial in a remark by the judge to the jury that "everything" that he "rule[d] on" was subject to review by the Supreme Judicial Court where he made it plain to the jury that their decision on the facts and credibility was final and not subject to review. [404]

There was no abuse of discretion where the judge at a criminal trial refused to suspend the trial at the usual afternoon hour therefor in order to complete the cross-examination of a witness that afternoon. [404–405]

No error appeared at a criminal trial in the judge's reading to the jury

the passage from *Commonwealth* v. *Webster*, 5 Cush. 295, 319, respecting alibi testimony where he adequately charged the jury as to the Commonwealth's burden of proving guilt beyond a reasonable doubt. [405]

There was no error at a criminal trial in the judge's charge as to the jury's endeavoring to reach a unanimous verdict "without prejudicing . . . their own conscience[s]." [405]

There was no error at a criminal trial in certain language in the charge relative to conspiracy and the meaning of the term accessory before the fact. [405–406]

SEVEN INDICTMENTS found and returned in the Superior Court on October 25, 1967.

Pretrial motions were heard by *Forte*, J., and the cases were tried before him.

Joseph J. Balliro for the defendant Tameleo.

Manuel Katz for the defendant French.

Ronald J. Chisholm for the defendant Cassesso.

Albert L. Hutton, Jr. (*John B. Greene* with him) for the defendant Grieco.

Chester C. Paris for the defendant Salvati.

David Berman for the defendant Limone.

Jack I. Zalkind, Assistant District Attorney (*James M. McDonough*, Legal Assistant to the District Attorney, with him), for the Commonwealth.

CUTTER, J. French and Grieco were indicted on October 25, 1967, for the murder of Edward Deegan on March 12, 1965. Tameleo, Limone, Cassesso, and Salvati were separately indicted as accessories before the fact. All these defendants, together with Joseph Baron (born Barboza), were charged in one indictment with conspiracy to murder Deegan, and in another indictment with conspiracy to murder Anthony J. Stathopoulos.

French was found guilty of murder in the first degree and Salvati was found guilty of being an accessory, each with a recommendation that the death penalty not be imposed. Grieco was found guilty of murder in the first degree, and Cassesso, Tameleo and Limone were found guilty as accessories. These four defendants were sentenced to death. Each defendant was found guilty on the two conspiracy

indictments. Baron entered a plea of guilty to the two conspiracy indictments on the opening day of the trial.[1] The other defendants appealed. The cases were tried under G. L. c. 278, §§ 33A–33G, as amended.

SUMMARY OF EVIDENCE.

On the evidence the jury could have found the following facts: Deegan's body was discovered in an alley in Chelsea about 11 P.M. on March 12, 1965. There were six gunshot wounds in the body. At least three different weapons had been used.

About 9:30 P.M. on that evening, Stathopoulos stopped an automobile on Fourth Street, Chelsea, opposite the entrance to the alley. With him were French and Deegan.[2] These two entered the alley. A few seconds after they disappeared, Stathopoulos "heard a volley of shots." French reappeared and was joined by a "quite heavy" man with a gun in his hand who looked like Grieco. Stathopoulos had not seen the man before. He heard a voice say, "Get him too." He "took off."

Baron's testimony was of major importance. His direct examination consumed two days and his cross-examination nearly six and one-half days. He had a long criminal record. Baron had known Grieco since 1961, and French and Limone since 1961 or 1962. He met Cassesso and Tameleo in 1964 and Salvati in February, 1965.

Baron, then a "loan shark," saw Limone about January 20, 1965, near an old store, known as the "dog

[1] The trial commenced on May 27, 1968. Numerous motions had been heard prior to that date. The trial judge examined 1,183 veniremen. A jury of sixteen persons was completed on June 26, the twenty-second day of trial, in proceedings recorded on 2,749 transcript pages. The trial continued until July 31, 1968, a total of fifty days. The stenographic record occupies 7,555 pages (exclusive of 614 pages of pre-trial hearings). There are 4,806 pages of transcript of proceedings after the last juror was sworn. The defendants saved 792 exceptions at trial and made 469 assignments of error.

[2] The purported purpose of the trip was a breaking and entering, and theft in a building abutting on the alley. By prearrangement, a door was to be left open to the premises of Beneficial Finance Company. Stathopoulos and Deegan discussed the plan with French at a Saugus bowling alley. French admitted his participation in the plan during his testimony.

house," on Prince Street, Boston. Baron gave Limone weekly interest on illegal loans owed by Baron to Limone. Limone asked to talk to Baron about "something important." They went to an office used by Limone. There, Limone (B–1)[4] offered him a "contract" to kill Deegan for $7,500, which Limone said had been approved by the "office" and that Tameleo knew of it. Baron explained (without objection) that the "office" was what "people termed as the Cosa Nostra."

Limone gave reasons for offering the "contract." (1) Deegan had participated in a theft from one Puopolo's house. Harold Hannah and William Delaney had been with him. They already had been "found floating in the water" dead.[5] (2) Deegan and Stathopoulos had been involved in the death (on October 17, 1964) of one Sacramone and "the office" was going to do something about it; and (3) Deegan had caused trouble, at the Ebb Tide Restaurant in Revere (see fn. 6), and had caused annoyance to Limone. Baron told Limone that he wanted to speak to Tameleo about the proposal.

Baron spoke to Tameleo (B–2, see fn. 4) at the Ebb Tide Restaurant about two days later. He told Tameleo that Limone "offered me a contract on . . . Deegan" and also "that the office okayed it." Tameleo said, "Yes, that's right." Baron said that, even though Limone "said it was

[4] This conversation originally was admitted solely against Limone. The judge instructed the jury to this effect. The letters B–1, B–2, etc. refer to the particular conversation (in which Baron participated) for ease in referring to them later in this opinion.

[5] In testimony witnesses mentioned the deaths of various persons connected in 1964 to 1966 with Deegan or with one or more of the defendants. These included Sacramone, died October 17, 1964; Hannah and Delaney, referred to above; Deegan, killed March 12, 1965; Romeo Martin, died July 9, 1965; Arthur Bratsos and Thomas DePrisco, friends or "partners" of Baron, referred to in Mr. John Fitzgerald's testimony, died November 15, 1966; and Chico Amico (killed December 7, 1966). The trial judge took pains to prevent the jury from learning, through introduction of the appropriate death certificates (see G. L. c. 46, § 19, as amended through St. 1950, c. 366; see later amendment by St. 1969, c. 478), that Amico, Bratsos, DePrisco, and Martin were homicide victims, although to some extent these facts appeared in cross-examination. Counsel for Tameleo, Grieco, French, and Salvati have brought to our attention (by appendices to their consolidated brief) that Mr. Fitzgerald, then counsel for Baron, lost a leg on January 30, 1968, when a bomb attached to the ignition of his automobile exploded.

all right . . . I want you to okay it . . . if you don't okay it, I won't do it." Tameleo said, "He definitely goes. . . . No punk like Deegan is going to push the office around and cause trouble inside the Ebb Tide."[6] Reference was made to Deegan as "involved in a $82,000 burglary in . . . Puopolo's" house.

Early in February, 1965, Baron spoke to Grieco and Tameleo, and by telephone with Cassesso, then in Florida. Baron went to Florida. There he told Cassesso (B–3) that he had a "contract" for $7,500. Before leaving Florida, he told Cassesso (B–4) that he would "try to cut him in on the contract."

Baron also saw Grieco in Florida. He (B–5) told Grieco, "I am trying to grab Deegan . . . and I can't . . . set him up." Grieco replied that "Deegan stole with . . . French." Baron offered Grieco "a piece of the action" if he would speak to French.

Later Baron in Boston spoke (B–6) with Limone about "the Deegan matter." While driving to Providence with Cassesso, Baron told (B–7) him "that the Deegan contract was an office matter and that . . . Limone was the one that offered it" to Baron "and that it was okayed." Baron told Cassesso "why the office wanted . . . Deegan wiped out."

About March 7, Baron arranged (B–8) for Grieco to see French at the Ebb Tide Restaurant where French was "a bouncer." Later Baron joined them and they discussed (B–9) the Deegan situation. French said, "I steal with Deegan, but I am not a friend of his." He undertook to help "to arrange this."

On March 11, French reported to Baron (B–10) "that there was a strong possibility of Deegan, Stathopoulos, and himself robbing a finance company in Chelsea" and that "it looked . . . as if Deegan and French were going to go in the alley and Stathopoulos was going to wait outside."

Baron (because he did not want Limone to know the

[6] Baron was told by Tameleo that the "office walked in ['for nothing'] for 20 per cent of the Ebb Tide . . . to keep down trouble." Another conversation revealed that Tameleo himself had bought out for $20,000 one Ventola's interest in the Ebb Tide.

precise date) then reported (B–11) to Limone "that it looked like within a few weeks" he could straighten out the matter but that "Stathopoulos would be involved." Limone said that he would "add . . . $2,500 if Stathopoulos was taken out of the picture." Baron inquired whether Tameleo knew about this. Limone replied that "the office knows about" it and that, "if they could get the two of them, it wouldn't make no difference."

Baron then went to Cassesso's apartment on Fleet Street. There he found Cassesso and Romeo Martin, an ex-convict. There had been a previous talk with Martin, in Cassesso's presence, about bringing Martin in on the "contract." Baron told (B–12) the others that he had "a contract on — Deegan" and "it looks like it's set for tomorrow." He also said that "French was . . . setting Deegan up." They were then joined by Chico Amico, then Baron's "partner." At the time of trial Martin and Amico were both dead (see fn. 5). Later Baron saw Grieco and told him (B–13) that Cassesso, Amico, Martin, and he (Baron) were involved "in regards to the contract itself" and that he (Baron) had "seen" Limone. Grieco said that he "didn't want the office to know" that he was involved but that the other participants were "all right with him."

Grieco and Baron then returned to Cassesso's apartment and (with Cassesso, Martin, and Amico) they discussed (B–14) the project of killing both Deegan and Stathopoulos. Grieco and Martin were to be in the alley before French and Deegan arrived. After Deegan was shot, Baron and Cassesso would "go to Stathopoulos' car." Amico, in a car not stolen, would endeavor to "stall" his car and delay any police in the neighborhood. At this discussion, it was suggested that Salvati be brought into the project.

Baron spoke (B–15) to Tameleo at the Ebb Tide. Baron reported to Tameleo that Limone had said "it would be all right to whack out Stathopoulos and . . . he was sure the office would okay it." Tameleo replied, "[H]e has . . . as many sins as Deegan has and he goes too." Baron testified that, if Tameleo had not given this approval and the earlier

approval of killing Deegan, he (Baron) would have done nothing further about killing Deegan and Stathopoulos.

About 2 P.M. on March 12, 1965, French who had just left Stathopoulos and Deegan reported (B–16) to Baron "French and Deegan would go in the alley and . . . Stathopoulos would stay . . . in the car." The project was set for 9 P.M.

Baron then went to the Fleet Street apartment. Grieco, Cassesso, Martin, Amico, and Baron discussed (B–17) the arrangements. Baron said that Salvati "would have to be involved." Cassesso produced Salvati, talked with him privately, and then reported, "Joe's included." Weapons and items of disguise were discussed.

At some point, it was agreed (B–18) that the murder fee be divided among Baron, Cassesso, Grieco, Martin ($1,500 each) Salvati and Amico ($750). No provision was made for French. Baron regarded his participation as "an act of friendship" to Grieco. The fee for killing Stathopoulos was to be divided in the same proportions.

About 7 P.M. Baron, Cassesso, Salvati, Martin and Amico met at the Fleet Street apartment. Salvati distributed silk gloves and, from a weapons stockpile kept by Cassesso, issued .357 magnums to Baron and Cassesso. Martin, who had his own .38, was given a .45 for Grieco. Baron later gave Salvati his own .38. For disguises, Baron and Cassesso each "had phony glasses and a moustache," Salvati "had glasses and a moustache and a wig that made him look bald (see fn. 7)," and Amico had a moustache. Martin had no disguise. Amico had no gun.

Cassesso, Martin, and Baron went to Fourth Street, Chelsea, and stopped. They attracted some attention, so moved on to the Ebb Tide Restaurant. Baron went inside and talked (B–19) with French.

About 9 P.M. Cassesso, Martin, and Baron left the restaurant. Amico in his automobile was told to follow the others. With Baron driving, Cassesso in front, and Salvati in the rear, these three went to a point around the corner from the alley. Grieco and Martin parked near them.

Salvati remained in the automobile. Cassesso and Baron got out. Baron waited at the corner of Fourth and Pearl Streets. Grieco and Martin entered the alley.

Baron headed back to the automobile. Cassesso "curled the back plate" and Baron bent the front plate. They then drove around several blocks and parked on Fourth Street. Salvati was to take the wheel and pull up in front of Stathopoulos' automobile "to box him in." They, however, saw a man on a corner nearby, who started toward them and looked at the bent number plates. It seemed to them as if he were "reaching for a gun" and might be the "law."[7] Baron "pulled out fast" with Cassesso still at his side. En route to the Ebb Tide Restaurant, Baron let Cassesso get out to warn Amico, Baron took off a bullet-proof vest, and with Salvati, he unbent the license plates.

At the restaurant Baron looked for French. After about half an hour, he saw French alone (B–20) briefly. French took Baron to a back room where Cassesso, Martin, Amico, and Salvati (but not Grieco) were present. French told (B–21) them that, as he and Deegan were going into the alley, "he thought Deegan . . . was starting to get suspicious." He said "he . . . shot Deegan in the back of the head." "[U]pon leaving the alley" French "was shocked to see . . . [Stathopoulos] still out there."

French had "reddish" stains on his sleeve and right shoe He explained, "When I shot . . . [Deegan] the blood went all over my arm." Martin told the group that he was inside the doorway when he "heard a shot." He "opened the door, and Deegan was just going to his knees." Grieco "was already over him," and "was firing into . . . [Deegan's] chest." French said that he had "got rid of the gun" (a .38). Cassesso said that he had seen the Stathopoulos car go by him.

On March 13, Baron was told (B–22) by Cassesso that

[7] There was later testimony from a Chelsea police captain that he had observed an automobile with bent plates on Fourth Street on the evening of March 12. There were two men in the front seat and a man in the back seat who had a bald spot. See Baron's testimony about Salvati's wig, described above. The automobile sped away.

French had been questioned the night before. Baron then saw Limone near the "dog house." Limone said (B–23) that Deegan "won't bother me . . . anybody any more." Baron told Limone that he and Cassesso had killed Deegan and that "French set him up," but that Stathopoulos had escaped. Limone left Baron for a few minutes and came back with packets of money.

Baron returned to Cassesso's apartment. Cassesso, Salvati, Amico and Martin were there. They counted the money and Baron distributed the shares of those present.

Baron later found Grieco on Brooks Street, East Boston, in his automobile. Baron gave him his agreed share of the money. Grieco had asked (B–24) for prompt payment the day before. Grieco said (B–25) that he was surprised "when French shot Deegan" and that he then "started shooting Deegan in the chest," and Martin "fired after him." Grieco "said he was going to use the alibi . . . that he never left Florida." Later on the thirteenth, Baron saw French who (B–26) "said that he got questioned last night and . . . they saw blood on his arm." He explained "about a guy had a bloodied nose that bled all over him."

Stathopoulos, after he drove away from the alley, went with a friend to the house of an Everett attorney, Mr. Alfred Farese. These three went to the Chelsea police station and later to the alley. Stathopoulos (later in March, 1965) had talks with Mr. Farese and Mr. John Fitzgerald, an attorney associated with Mr. Farese. In September, 1967, he spoke with the district attorney of Suffolk County. Other testimony by Stathopoulos is discussed later in this opinion.

Robert Glavin, who had been serving a sentence for first degree murder, testified that while at Norfolk prison colony one Ventola approached him, on behalf of Cassesso, about making a false confession to the murder of Deegan. He also talked with Cassesso. These conversations are discussed later in this opinion.

Mr. Fitzgerald (released by Baron and Stathopoulos from the attorney-client privilege) testified that he had known Grieco, French, and Deegan since 1964. He had seen

French and Grieco together. He also knew Tameleo, and Limone. He had known Stathopoulos before March 12, 1965. From about 1:30 A.M. to about 5:30 A.M. on March 13, Mr. Fitzgerald saw French (as his lawyer) at the Chelsea police station. He observed blood spots on French's sleeve and on his shoe. He went to the police station with Stathopoulos on March 15 or 16, 1965.

On May 21, 1967, Mr. Fitzgerald met Grieco. As a consequence, between July 11 and 15, 1967, he met Tameleo and Grieco. He had not been attorney for either defendant.[8]

Tameleo asked what Mr. Fitzgerald knew about the Deegan affair. Mr. Fitzgerald told him that Stathopoulos had been with Deegan and French at the time Deegan was killed and that subsequent attempts had been made to kill Stathopoulos. To this, Grieco said, "We can't afford to have anybody playing around with that kid," and also, "I will have to speak to some people about it."

Tameleo asked why Baron was coöperating with the authorities. Mr. Fitzgerald told him that Baron thought two friends (Bratsos and DePrisco, see fn. 5) had been killed by "the combination," that attempts had been made to kill his brother, his wife, and his child, and that "they" had taken over Baron's "shylocking business." Grieco said that he knew how to straighten out Baron (by giving him "bread," i.e. money). Tameleo said that Grieco "was his man and that any future deals" should "be made through . . . Grieco."

Mr. Fitzgerald spoke with Grieco and Mr. Farese (probably about August 6, 1967).[9] Mr. Farese said that "they"

[8] This conversation was offered not only against Tameleo and Grieco, but originally against the others, on the ground that a conspiracy to kill Stathopoulos continued until the time of the conversation. On the next day of trial, the judge (after examining the evidence relating to the termination of the conspiracy) instructed the jury that the testimony given up to that point by Mr. Fitzgerald was to "be considered . . . only as against . . . Tameleo and . . . Grieco."

[9] This conversation was admitted against (1) Grieco, who was present; and (2) Tameleo, because "his man," Grieco, was present; and (3) against the others because a conspiracy to kill Stathopoulos could be found to be still continuing. The following day the judge (see fn. 8) modified his ruling and instructed the jury that the evidence was to be admitted only against Tameleo and Grieco.

were willing to pay Baron $25,000 not to testify in the Deegan case. It was proposed that Grieco "straighten . . . out," or even "whack out," Arthur Pearson (the victim of a stabbing for which Baron had been indicted) and that one Fabiano "take the beef on" another such indictment. On the next day, Mr. Fitzgerald talked with an F.B.I. agent and then with Baron. Mr. Fitzgerald thereafter told Grieco that Baron said $25,000 was not enough and he wanted $50,000. Grieco later reported, "We will give him $50,000 . . . not [to] testify in the Deegan case." Mr. Fitzgerald saw Baron the next day, and then told Grieco that Baron was going to coöperate with prosecuting officials.

French, in his testimony, admitted being in the alley with Deegan and that he had gone with Deegan and Stathopoulos to the area. He had heard five to seven shots, and left the alley. He denied having any gun with him. He had known Grieco since 1945 but did not see him in 1965 because Grieco was in Florida. Other defendants' testimony, which the jury were not required to believe, is summarized in the margin.[10]

Other aspects of the evidence are discussed in connection with the assignments of error. We discuss in the body of the opinion those assignments which appear to present the most substantial issues. In the Appendix, there is brief discussion of many other issues.

[10] Tameleo and Cassesso did not testify. Limone testified that he had been friendly with Deegan; that he had no alibi for March 12, and 13, 1965, that he first met Baron at the end of February, 1965; that he had seen Stathopoulos with Deegan in a veterans' club; and that he had known Grieco only from late 1965. French he met in the Charles Street jail. He had known Cassesso and Salvati for ten to twelve years and Tameleo for four or five years. Grieco testified that he was in Florida from February 24, 1965, to the end of April, that he never was in an apartment on Fleet Street with Baron or in the vicinity, and that he had no part in killing Deegan. Salvati testified that he did not know where he was on March 12, 1965. He admitted that he had been in the Fleet Street apartment, but only once when Baron and Cassesso also were there and Baron stabbed one Civetti. Salvati also testified that he did not know Grieco, that he had known Limone casually for ten years, and that he had not known Tameleo or Baron prior to March 12, 1965.

REQUESTS FOR SEVERANCE OF TRIALS.

1. During the trial,[11] motions to sever (the cases against the six defendants) were made on various grounds. We consider first those which relate to *Bruton* v. *United States*, 391 U. S. 123 (decided May 20, 1968, one week before this trial commenced). See *Roberts* v. *Russell*, 392 U. S. 293, 294.

In the *Bruton* case (see p. 124) one Evans and Bruton were tried together for armed postal robbery. A postal inspector obtained an oral confession from Evans, which (see p. 124, fn. 1) led to a later confession by Evans which implicated Bruton. The confession was admitted against Evans, but (p. 125) the judge instructed that it was inadmissible against Bruton. The Court of Appeals (1) reversed Evans' conviction because no warnings had been given to Evans and the confession (pp. 125–126) thus had been wrongly admitted against him, but (2) allowed Bruton's conviction to stand because the confession had not been admitted against him. The Supreme Court (with two dissents, pp. 138–144) reversed because (p. 126 et seq.) "of the substantial risk that the jury, despite instructions . . . looked to the incriminating extra judicial statements in determining . . . [Bruton's] guilt." The majority held that "admission of Evans' confession in this joint trial violated . . . [Bruton's] right of cross-examination secured by . . . the Sixth Amendment." We, of course, are compelled to follow the *Bruton* case, if it applies to the facts before us. See *Commonwealth* v. *Carita*, 356 Mass. 132, 137–140.

There are differences between the *Bruton* decision and the present case. (1) The *Bruton* case dealt with a post-arrest confession by a codefendant to an investigating official. In the present case, no defendant (other than Baron) has confessed.[12] (2) Four defendants (Limone, French, Grieco, and

[11] Motions to sever made prior to trial were denied. Action upon these pre-trial motions was a matter within the presiding judge's discretion. No abuse of discretion has been shown. *Commonwealth* v. *Fancy*, 349 Mass. 196, 204. See *Commonwealth* v. *Scott*, 355 Mass. 471, 476–478.

[12] Our cases have viewed admissions as different from confessions. See *Commonwealth* v. *Bingham*, 158 Mass. 169, 171; *Commonwealth* v. *Seeley*, 167 Mass. 163, 165; *Commonwealth* v. *Sacco*, 255 Mass. 369, 413.

Salvati) took the stand and were available for cross-examination.[13] (3) There are conspiracy charges, as well as substantive murder charges, against each defendant. Principles (constituting well recognized exceptions to the hearsay rule) governing the admissibility of evidence of statements of coconspirators, to prove conspiracy and common criminal enterprises, are thus applicable.[14] These have not been treated as altered by the *Bruton* case. See *Parness* v. *United States*, 415 F. 2d 346, 347 (3d Cir.); *Campbell* v. *United States*, 415 F. 2d 356 (6th Cir.). (4) certain out-of-court statements, discussed below, were received in evidence. These, for the most part, originally were admitted only against the defendants to whom they were attributed (and others present when they were made). They do not appear very directly or clearly to charge defendants (not present when the statements were made) with complicity in Deegan's murder. In this they were not like Evans' confession "expressly implicating" Bruton (391 U. S. 123, 124, fn. 1).

We examine in detail the principal out-of-court statements which the defendants suggest may present an issue under the *Bruton* case.

(a) Baron testified to four conversations with Limone or Tameleo. (i) Baron's first talk (about January 20, 1965) with Limone (B–1, see fn. 4) about the "contract" when Baron asked Limone if Tameleo knew about the offer, and Limone "said yes"; (ii) Baron's report (B–2) to Tameleo, about the "contract" offer (and Limone's statement "that

[13] It does not appear that any defendant in fact cross-examined any other defendant who took the stand. At the conclusion of the testimony of Limone (the first defendant to testify), the trial judge inquired whether the defendants had questions. Three attorneys indicated that they had no questions. Cassesso's attorney purported to reserve cross-examination until after the assistant district attorney's cross-examination. He then asked no questions. No similar inquiry was made by the judge after other defendants testified on direct examination. No specific request, however, was made by any defendant for the privilege of making inquiry of any defendant who took the stand.

[14] See *Commonwealth* v. *Riches*, 219 Mass. 433, 438; *Commonwealth* v. *Benesch*, 290 Mass. 125, 132–133; *Commonwealth* v. *David*, 335 Mass. 686, 694; *Commonwealth* v. *Binkiewicz*, 342 Mass. 740, 758; *Commonwealth* v. *Kiernan*, 348 Mass. 29, 56, cert. den. sub nom. *Gordon* v. *Massachusetts*, 380 U. S. 913; *Commonwealth* v. *Stasiun*, 349 Mass. 38, 51; *Commonwealth* v. *Monahan*, 349 Mass. 139, 153–154; *Commonwealth* v. *Hamblen*, 352 Mass. 438, 443–444. See fn. 27, *infra*.

the office okayed it"), and Tameleo's reply "Yes, that's right"; (iii) Limone's offer (B–11) to Baron to have "Stathopoulos . . . taken out of the picture," and his statement that the "office knows about" it or "will know about this"; and (iv) Baron's later report to Tameleo (B–15) that Limone had said that "it would be all right to whack out Stathopoulos," and Tameleo's reply, "[H]e goes too." The statements attributed to one only incidentally tended to implicate the other, principally by indicating that each had knowledge of the other's words and actions. We do not view the *Bruton* case as preventing introduction, in a joint trial, of out-of-court admissions by one defendant which only incidentally and indirectly reflect adversely on another defendant. These conversations do not require severance.[15]

(b) Baron's talks (February, 1965) with Cassesso (B–3, B–4) and Grieco (B–5) in Florida and his talk (B–7) with Cassesso when en route to Providence added nothing to earlier testimony about the offer of the "contract" and the "office" approval of it. It made no charge (concerning the Deegan murder or the effort to kill Stathopoulos) against defendants other than Cassesso, if indeed it made any charge against him.[16]

(c) Stathopoulos testified that Baron told him in September, 1967, that Baron "was the one to shoot" Stathopoulos; that the "office" wanted him "knocked off," and that Baron had tried to poison him at Deer Island. There were other references to the "office" in out-of-court statements

[15] It is also argued that Baron's testimony concerning these statements by Tameleo and Limone implicated other defendants under the conspiracy indictments. Separate testimony of Baron linked each other defendant with each conspiracy. Cf. *Commonwealth* v. *Stasium*, 349 Mass. 38, 47–48, 50–53. As to the conspiracy indictments, Baron's conversations with Tameleo and Limone merely tended to prove that they had joined the conspiracies. It "is not necessary that all the conspirators join in every part of the unlawful transaction" and "the knowledge possessed by each [conspirator] of the scope . . . of the affair may be widely at variance." See *Commonwealth* v. *Beal*, 314 Mass. 210, 222–224; *Blumenthal* v. *United States*, 332 U. S. 539, 556–557.

[16] No charge, directly relating to Deegan's murder, was implied in Baron's quotation of Cassesso during this trip as accusing Limone of having in earlier days, "ratted on some guys," and Tameleo of having "told the law about a [illegible] stick-up where two guys got killed."

testified to by Baron and other witnesses.[17] Tameleo contends that these statements must be taken as referring to him.

The jury could infer that Baron regarded Tameleo as having some authority (not well defined) to speak for the "office" (at least with respect to killing Deegan and Stathopoulos), and Limone as having even less authority. The evidence does not show what the organization was, who belonged to it, or how it was organized. Baron admitted that, by claiming credit for the Deegan murder, he wanted to "elevate" himself with the organization. The witnesses who mentioned it seemed to regard it apparently with apprehension (see fn. 5), as a group of substantial size and of unspecified membership and activities. Tameleo was quoted by Baron (see fn. 6) as saying that the "office" had "walked in" on the operation of the Ebb Tide. From this it might be inferred that even Tameleo regarded the "office" as being something other than himself.[18] The vague, indefinite references to the interest of the "office" in the Deegan situation did not amount, we conclude, to any identifiable charge against any other defendant.

(d) We perceive no charge against defendants other than Tameleo and Grieco in Mr. Fitzgerald's accounts of his talks with one or both of them about efforts to keep Baron from testifying. Mr. Fitzgerald's talks with Grieco (when Tameleo was not present) implicated Tameleo, but he had recently designated Grieco to Mr. Fitzgerald as "his man" and had said "that any future deals . . . were be to made through . . . Grieco." Tameleo thus cannot reasonably complain of charges or admissions concerning him made in

[17] One statement by Glavin, referred to by some defendants in their brief, is immaterial because it was made during voir dire testimony in the absence of the jury.

[18] At pre-trial hearings on motions for admission to bail (December 4, 1967) considerable evidence was introduced concerning important connections of Tameleo and Limone with the Cosa Nostra organization, including a report of hearings in October, 1963, before the Senate Committee on Government Operations, 88th Cong. 1st Sess. part 2, see pp. 550–559, 565–568, entitled "Organized Crime and Illicit Traffic in Narcotics." No effort, however, was made at trial to prove before the jury any defendant's membership in the Cosa Nostra. Indeed, the trial judge took unnecessary precautions to avoid such evidence, when objection was made, in connection with the cross-examination of Glavin, discussed later in this opinion.

talks with one in effect named by him as his agent. Mr. Fitzgerald's statements (concerning what he knew of the activities of Deegan, Stathopoulos, and French on March 12, 1965, and of later attempts on Stathopoulos' life) implicated no defendant except French, who, in any event, admitted being with Stathopoulos on March 12 just before Deegan was killed.

The language of the *Bruton* case is general. We recognize that hereafter it may be applied more broadly than was required by the precise facts then before the Supreme Court. Weighed in the context of a long trial, we think that the out-of-court statements, relied on as requiring severance under the *Bruton* decision, do not contain sufficiently definite charges against other defendants to require the judge to grant severance.[19]

2. The defendants contend that the conspiracy indictments should have been tried separately from the capital cases because of G. L. c. 278, § 2A, inserted by St. 1968, c. 721, § 2.[20] Chapter 721, approved July 19, 1968, does not

[19] These cases were tried almost immediately after the *Bruton* decision. The scope of that decision still remains uncertain two years later. See e.g. *Caton* v. *United States*, 407 F. 2d 367, 372–373 (8th Cir.), cert. den. 395 U. S. 984; *Jordan* v. *United States*, 416 F. 2d 338, 344 (9th Cir.); *James* v. *United States*, 416 F. 2d 467, 474–475 (5th Cir.); *Posey* v. *United States*, 416 F. 2d 545, 550–551 (5th Cir.); *Williams* v. *United States*, 416 F. 2d 1064, 1070 (8th Cir.); *Roberts* v. *United States*, 416 F. 2d 1216, 1224 (5th Cir.). See also *Commonwealth* v. *Scott*, 355 Mass. 471, 477–478; *United States ex rel.* v. *Pate, Warden*, 418 F. 2d 1028, 1030–1031 (7th Cir.).

[20] Section 2A reads, "An indictment for conspiracy to commit a substantive offence shall not be tried simultaneously with an indictment for the commission of said substantive offence." The Governor (1968 House Doc. No. 3797, p. 2, and Appendix C, pp. 21–22), on February 6, 1968, recommended legislation giving greatly increased penalties for conspiracy. He did not recommend what is now § 2A. On June 27, 1968, the House Committee on the Judiciary reported only 1968 House Bill No. 4771, a somewhat longer version of what is now § 2A. See 1968 House Journal, p. 2165. On June 28, 1968, on motion of the Chairman of the House Committee on the Judiciary, 1968 House Bill No. 4799 was substituted. That contained the bill originally recommended by the Governor plus what is now § 2A. See 1968 House Journal, p. 2197. A further amendment (not here relevant) to § 1 of the bill (inserting G. L. c. 274, § 7) later was adopted in the Senate. See 1968 Senate Journal, p. 1681. The legislative history affords no indication of why § 2A, which may add new complications to enforcement of the criminal law, was adopted at all, or that there was any provision or reason for it to become effective upon passage. Because we hold that c. 721 has no application to the present case, there is no occasion for us to consider its interpretation or validity. See discussion below (part 8 of this opinion) concerning admissibility of evidence of acts and declarations of participants in a common criminal enterprise.

explicitly state when it shall be effective. It was not an emergency law and thus could not have been effective earlier than August 18, 1968.[21] We see nothing in § 2A which should lead to the application of the section to a trial completed when it took effect, or to indicate that the Legislature intended any retroactive application.[22]

3. Severance was not required because of the effect of the joint trial upon the number of peremptory challenges by the Commonwealth and the defendants, respectively. *Commonwealth* v. *Millen*, 289 Mass. 441, 486–487. See *Commonwealth* v. *Geagan*, 339 Mass. 487, 502.

4. The defendants cite no controlling authority for the principle that they were entitled to a severance because of the possibility that they might wish to assert antagonistic defences or use different trial strategy.[23] *Garrity* v. *New Jersey*, 385 U. S. 493, 500, is not such authority. See *Caton* v. *United States*, 407 F. 2d 367, 372 (8th Cir.), cert. den. 395 U. S. 984. Severance for these reasons was discretionary with the trial judge.

5. Tameleo, and to some extent other defendants, contend that the conduct of other defence counsel required severance. There was an unusual amount of unseemly, abrasive colloquy, and unduly frequent interruption of testimony by

[21] If c. 721 should be construed as relating to the powers of the Superior Court, then it was not subject to The Referendum. See art. 48 of the Amendments to the Constitution of the Commonwealth, The Referendum, I and III. A statute not subject to The Referendum "for which a different time of taking effect is not therein expressly provided" takes effect "on the thirtieth day next after the earliest day on which it has the force of a law." See G. L. (Ter. Ed.) c. 4, § 1. Chapter 721, if not subject to The Referendum, thus took effect on August 18, 1968. Cf. *Commonwealth* v. *Sacco*, 255 Mass. 369, 410–411, where the amendatory act there discussed "provided in § 2, that it should take effect upon its passage." See *Mayor of Gloucester* v. *City Clerk of Gloucester*, 327 Mass. 460, 463–464. If c. 721 was subject to The Referendum, it took effect ninety days after its approval. See *Coyle* v. *Swanson*, 345 Mass. 126, 127 (bill not within the "excluded matters" under art. 48 of the Amendments).

[22] This trial extended from May 27 to July 31, 1968. See fn. 2.

[23] Tameleo rested at the close of the Commonwealth's case. Cassesso introduced no testimony. The other defendants offered evidence which brought out that certain defendants knew each other, and had been together on various occasions. The criminal records of defendants who took the stand were introduced to impeach their credibility. The prosecution, when Tameleo rested, gave warning that examination of defence witnesses might bring out information concerning or affecting Tameleo. See part 22 of this opinion, *infra*.

repetitive objections. At least one witness and the assistant district attorney on occasion showed understandable exasperation. Some of the numerous incidents are discussed in the Appendix (par. A-27). The trial judge did not abuse his discretion in permitting the joint trial to continue despite these clashes (and the consequent admonitions of counsel by the judge). See *Commonwealth* v. *Millen*, 289 Mass. 441, 460–462; *Commonwealth* v. *Lewis*, 346 Mass. 373, 378–379; *Commonwealth* v. *McLaughlin*, 352 Mass. 218, 226–229.[24]

ACCESS TO GRAND JURY MINUTES.

6. The trial judge reasonably denied the defendants access to the grand jury minutes in advance of trial. *Commonwealth* v. *Carita*, 356 Mass. 132, 140–141.

7. When Baron completed his direct testimony, the defendants renewed their request that they "be furnished the [grand jury] minutes . . . concerning the . . . subject matter of . . . [Baron's] testimony." This request was denied. Defence counsel agreed that the trial judge might examine the transcript of Baron's grand jury testimony. The judge, during a recess, found one inconsistency between the minutes and Baron's trial testimony. This he disclosed to counsel.

A similar motion for grand jury minutes was made at the close of Stathopoulos' direct examination with respect to his grand jury testimony. We are referred to no place in the record showing that the motion for the grand jury testimony was pressed after the judge had opportunity to examine that testimony. These grand jury minutes never were produced.

The grand jury minutes of Baron's testimony were sought at the close of his direct examination and before he gave most

[24] A trial judge properly should be slow, especially after a substantial period of trial, to permit conduct of defence or other counsel to coerce a mistrial or to lead to "manufacturing error." *Commonwealth* v. *Carita*, 356 Mass. 132, 139. It is ground for prompt disciplinary action if trial counsel engage in, or encourage, or fail to exercise reasonable efforts to prevent, conduct improperly disturbing proceedings.

of his testimony on cross-examination, largely relied on now as showing "particularized" need for the minutes.[25] Cassesso's counsel later renewed his request for these minutes during his cross-examination of Baron, but this request also preceded most of Baron's testimony on which the defendants seem to rely.[26]

The trial judge in his discretion might well have made more of Baron's grand jury testimony available for use in cross-examination, but he was not bound to do so. The matters brought out on cross-examination (fn. 26) of Baron, however, were not before the trial judge at the time of his earlier rulings concerning the grand jury minutes. On the facts then before him he was warranted in denying the requests. If later testimony changed the situation, it was the defendants' duty to renew their motions. There was no abuse of discretion.

Also, no abuse of discretion appears concerning the grand jury testimony of Stathopoulos. The defendants have not shown that they pressed for these minutes adequately, after the judge had been given them for examination, or that they suffered any prejudice from not having the material.

EVIDENCE OF OUT-OF-COURT STATEMENTS AND RELATED MATTERS.

8. It is assigned as error that testimony was received from Baron, Stathopoulos, and Mr. Fitzgerald concerning state-

[25] See *Commonwealth* v. *Doherty*, 353 Mass. 197, 209–210; *Commonwealth* v. *Carita*, 356 Mass. 132, 141–142; *Commonwealth* v. *Gordon*, 356 Mass. 598, 602–603.

[26] Baron, during cross-examination, testified (a) that on March 29, 1967; he gave partial information about the Deegan murder to F.B.I. agents, (b) that he then was indicted in April, 1967; (c) that, although he was in custody in isolation in May, 1967, he started to talk to the district attorney's representatives in July, when "deals were being made"; (d) that he told the Deegan murder story "in pieces" and did not reveal the full story he told at trial until September 8, 1967; or before the grand jury; and (e) that he first testified before a grand jury on the Deegan murder in October, 1967. The trial judge put at the disposal of defence counsel certain grand jury testimony concerning the date when Baron had thought that he had obtained his "contract" from Limone. Baron was cross-examined about this and also extensively about the dates of his Florida trip which he had thought was at a different time until shown an airplane ticket, apparently not produced until after his grand jury testimony.

ments, made in the absence of one or more of the defendants, without limiting the evidence to the declarant and persons present.

In Massachusetts, under "a conspiracy indictment, the acts and declarations of one conspirator in pursuance of the common object are admissible against the other conspirators. . . . [B]efore the acts and declarations of one are admissible against the others," the judge must make a preliminary finding upon evidence aliunde that a conspiracy exists. *Commonwealth* v. *Stasiun*, 349 Mass. 38, 50. By the end of Baron's direct testimony, an adequate showing of conspiracy [27] had been made, for Baron's testimony included accounts of conversations with, and admissions to him by, each defendant, which permitted a finding that the defendant was a member of conspiracies to kill Deegan and Stathopoulos. Baron was, according to his testimony, the central figure of each conspiracy. Each defendant could be found to have conspired at least with him. As a consequence, at least as early as the end of Baron's testimony, out-of-court statements of defendants were admissible, against all members of the conspiracy, if the statements were in furtherance of a still continuing conspiracy.

The trial judge, in his charge, explained his action with respect to out-of-court statements by the several defendants,

[27] See *Commonwealth* v. *Benesch*, 290 Mass. 125, 132–133; *Commonwealth* v. *Kiernan*, 348 Mass. 29, 57–58. See also cases collected in Toomey, Some Procedural Aspects of the Prosecution of a Conspiracy in Massachusetts. 53 Mass. L. Q. 207, 240–242. No clear determination (see fn. 14) that there was a prima facie case of conspiracy appears on the record. During Baron's direct testimony, such a determination was postponed. Counsel at one point reminded the judge in a bench conference that such a ruling had already been made "in chambers" but that it had not been "told . . . to the jury." Defence counsel successfully objected to having the judge inform the jury of his ruling during trial, although he could have done so. See *Commonwealth* v. *Rogers*, 181 Mass. 184, 191. The judge instructed in the course of trial that any conspiracy "ended . . . sometime in the end of 1965 or '66. Once the alleged conspiracy [ended], *if you believe there was a conspiracy — I'm not saying there was* — then any action of one defendant can only [b]ind him, if you believe the evidence, and is not admissible against the others" (emphasis supplied). As an alternative to the procedure described in the passage quoted from the *Stasiun* case, 349 Mass. at p. 50, such evidence from a coconspirator may be admitted with the expectation that a particular defendant will be linked to the conspiracy and subject to his motion to strike the evidence if the link is not established. See *Commonwealth* v. *Kiernan*, 348 Mass. 29, 56–58.

testified to by Baron and others. He said, "At first I allowed evidence of the action of one person only against him and not . . . against the other defendants. Then the second man, and the third man, the fourth man, *until I found enough evidence to submit to you whether there was a conspiracy or not*, and I so told the lawyers [see fn. 27], that I found sufficient evidence *for the consideration of the jury* of a conspiracy" (emphasis supplied). In discussing when a conspiracy ends, he added: "I say this because once there is a conspiracy in existence, anything that any member of the conspiracy does or says in furtherance of the objective of that conspiracy binds all of them . . . . But once the conspiracy is over, then what one does does not bind anyone else but himself."

Cassesso's counsel excepted "to that part of the . . . [charge] where you said the acts and declarations of one bind all during the conspiracy because that was left up in the air . . . and I contend that it only applies to the conspiracy indictment and not to the substantive charges." This exception was without merit. (1) There had been no request when the evidence came in that it be so limited. See *Runels* v. *Lowell Sun Co.* 318 Mass. 466, 471. (2) A more important reason is that (emphasis supplied) "where there is proof . . . that two or more persons are engaged *in a common criminal enterprise*, the acts and declarations of one, during the enterprise and in furtherance of it, affect all." *Commonwealth* v. *Chapman*, 345 Mass. 251, 255. See *Commonwealth* v. *Tivnon*, 8 Gray, 375, 381; *Commonwealth* v. *Mulrey*, 170 Mass. 103, 111; *Runels* v. *Lowell Sun Co.* 318 Mass. 466, 471–472; Wigmore, Evidence (3d. ed) § 1079; McCormick, Evidence, § 244, pp. 521–523; Mottla, Proof of Cases in Mass. (2d ed.) §§ 820–825. The evidence permitted the jury to find that the common enterprise of killing Deegan went (on the part of each defendant) beyond mere conspiracy.

During Baron's testimony prior to the time when a finding of conspiracy or common enterprise would have been warranted, the trial judge limited the admissibility of certain

statements by Baron concerning his conversations with particular defendants to those defendants (and other persons present at the respective conversations). As to the first conversation (that with Limone at his office near the "dog house," B–1) the judge gave ample limiting instructions and some explanation of the reasons for them. Similar instructions were given concerning Baron's first talk (B–2) with Tameleo at the Ebb Tide Restaurant. Short limiting instructions were given with respect to the defendants mentioned in Baron's talks, designated B–3, B–12, B–13, B–19, B–22, B–24. There appears to have been no possible violation of the hearsay rule in the light of the limiting instructions. Adequate limiting instructions were also given concerning two photographs, a talk with Tameleo, Cassesso, and Amico a few days after Deegan was killed, a talk with French and Mr. Farese on March 12 or 13, and a later talk with Cassesso in Providence.

As to some of Baron's conversations, no limiting instructions were given. Some seem completely harmless.[28] Concerning others no adequate exception was saved in behalf of any absent defendant.[29] Exceptions were saved concerning other out-of-court statements, but no request was made at the time for limiting instructions.[30] See *Commonwealth* v. *Giacomazza*, 311 Mass. 456, 468; *Commonwealth* v. *Eppich*, 342 Mass. 487, 493–494. See *Solomon* v. *Dabrowski*, 295 Mass. 358, 359–360. Eventually, of course, the state of the testimony permitted the trial judge to admit against each of the defendants the statements of any defendant in furtherance of (and during) the conspiracy or common enterprise. We conclude that no prejudice resulted from any failure of the trial judge to limit the applicability of any such testimony given before a finding of conspiracy or common criminal enterprise would have been warranted.

[28] Such conversations, barely referred to in the joint brief for Tameleo, Grieco, French and Salvati, include (see fn. 4) part of conversation B–5 (the first of two talks with Grieco in Florida); and conversation B–8 (talk with Grieco, objections only to comments of judge on interruptions).

[29] These conversations include (fn. 4) part of B–5 (the second of two talks with Grieco in Florida); B–7 (objection only by Cassesso); B–14 (planning conference at Cassesso's apartment; exception by Cassesso only); B–16 (one talk with French on March 12; no objection when first described, but an objection for Cassesso when later questions asked about this conference); B–17 (conference at Cassesso's apartment); B–18 (same); B–21 (back room conference, Ebb Tide).

[30] Such conversations included B–9 (Grieco and French at Ebb Tide); B–10 (French); B–11 (Limone outside the "doghouse"); the second reference to B–17 (French); B–23 (Limone, March 13, 1965).

9. During direct examination, Baron was asked (B–2, B–15) whether he would have proceeded with the plans concerning Deegan and Stathopoulos, if Tameleo had not authorized him to do so. Baron, subject to exception, answered in the negative. Baron had already given Tameleo notice (B–2) that, "if you don't okay it, I won't do it." The question concerning Tameleo's "okay" of killing Stathopoulos referred to "this Deegan matter." The answers thus did not relate to any state of mind of Baron not communicated to Tameleo. They also were in part cumulative explanation of Baron's request for approval. Even if the jury should have been left to infer Baron's intentions (not directly in issue) from what he actually said, the answers added little. Any error was harmless. See *Commonwealth* v. *Burke*, 344 Mass. 243, 248; Wigmore, Evidence (3d ed.) §§ 581, 1963; Mottla, Proof of Cases in Mass. (2d ed.) § 1201.

10. Stathopoulos testified to out-of-court statements by defendants and others, including some by Baron after the conspiracy had ended.

(a) Stathopoulos told about talks on March 12, 1965, with Deegan and one Moore about plans for their proposed break. No defendant was present. The judge erroneously admitted this testimony as res gestae. See *Rocco* v. *Boston Leader, Inc.* 340 Mass. 195, 196. See also *Commonwealth* v. *Hampton*, 351 Mass. 447, 449–450; Anderson, Wharton's Criminal Evidence (12th ed.), §§ 279–282. The talks about plans were in large part consistent with French's later testimony (about the actual events of March 12, 1965, as carried out) in which he admitted that he was at the alley. Conversations with Deegan when French was present were reasonably related to and in furtherance of the alleged common criminal enterprise. There was no prejudice.

(b) Stathopoulos testified that, about September 8, 1967, at his own request he had talked to Baron at the Barnstable County jail in the presence of two F.B.I. agents and others. Baron then told Stathopoulos that he had planned to kill him, that "it was the office that wanted . . . [Stathopoulos] knocked off," and that it was he [Baron] who had tried to have Stathopoulos poisoned. Stathopoulos also testified that, at Charles Street jail, Baron had told him that if he held "any animosity toward . . . French . . . other people will have to take action." These conversations were after the conspiracy had ended.

Baron had been cross-examined about the attempt to poison Stathopoulos, about his conversation at Barnstable with Stathopoulos, and about his motives for testifying. There had been some suggestion in the cross-examination that Baron's testimony might have been influenced by his brief talk with Stathopoulos. The trial judge acted within his discretion in permitting Stathopoulos to tell about the Barnstable talk, to explain the nature and brevity of the meeting, and to contest any suggestion of contrivance more recent than the date of the talk in September, 1967. See *Commonwealth* v. *Tucker*, 189 Mass. 457, 479–485; *Commonwealth* v. *Retkovitz*, 222 Mass. 245, 249–250; *Commonwealth* v. *Williams*, 244 Mass. 515, 520; *Commonwealth* v. *Giacomazza*, 311 Mass. 456, 469–470. The talk with Baron at Charles Street jail was largely irrelevant. There was no prejudice in either conversation.

Later Cassesso called as his own witness Detective John F. Doyle of the district attorney's office. He had been present at the Barnstable conversation and at an earlier talk on the same day with Stathopoulos alone, in which Stathopoulos had given information in some respects perhaps inconsistent with his later testimony. Detective Doyle, on direct examination, testified that Stathopoulos, after he talked to Baron, "expanded on his original statement" about the Deegan matter. On cross-examination, the district attorney properly was allowed to show (a) that there was no conversation at Barnstable about the facts of the Deegan murder and

that the conversation was confined to describing various efforts to kill Stathopoulos "because he had too much knowledge concerning the Deegan affair," and (b) that Detective Doyle had never given Stathopoulos "any information . . . concerning" Deegan's death or asked him to change his story. This cross-examination was appropriate to rebut any inference from the direct examination of Detective Doyle that Stathopoulos' testimony had been suggested in part by Baron at Barnstable.

Questions Affecting Glavin's Testimony.

11. Robert Glavin (see *Commonwealth* v. *Glavin*, 354 Mass. 69) testified that he had been confined at the Norfolk prison colony under life sentence for first degree murder. In November, 1967, Glavin was approached by one Ventola at the prison hospital where Glavin was an orderly. As a consequence, Glavin talked with Cassesso. The judge promptly ruled that these conversations could "be used or considered . . . only against . . . Cassesso and against no one else." Cassesso was then "camp chairman" at the colony.

There was an extensive voir dire, at the request of Cassesso's attorney. During this, Glavin testified that Ventola had told him that the "office" wanted Glavin "to cop out" (i.e. wrongly confess to) the Deegan murder, for which, Glavin was told, Cassesso had been indicted. Glavin "had worked for them before." In return they would (1) pay him $50,000 (to be handed to someone, not in prison, chosen by Glavin), (2) "take care of . . . [Glavin's] kids . . . and . . . [3] see if they could do something with the parole board for" him. They were going to "school" Glavin in the facts of the Deegan murder.

Glavin testified that he was not merely "asked" to confess to the Deegan murder but "was really told." He "figured . . . [he] was a patsy" for the "office." He wanted help, spoke to a prison official, and arranged to see F.B.I. Agent Hanlon. Glavin told Hanlon he had been

asked "to cop out . . . and that . . . [he] didn't want to do it . . . that . . . [he] didn't know what else to do." Hanlon told Glavin "to go ahead like I was going along with it." Thereafter Glavin talked with Cassesso alone and even later with one Lammatino (also known as Chong), Ventola, and Cassesso. At this talk, a somewhat modified offer (to put the $50,000 in escrow with a lawyer) was made. Glavin reported these talks to F.B.I. Agents Hanlon, Condon, and Rico. The F.B.I. agents told Glavin that they would "do their best to protect" Glavin and his family. Thereafter, Cassesso, Ventola, and Lammatino told Glavin that "they wanted to make sure that they had something on him" so that he could not "turn around and . . . give testimony against them." For this reason, they wanted him "to make a hit" on (i.e. kill) a "guy named McElaney." They gave Glavin two days to make up his mind.

A prison friend told Glavin that "this hit was just a set-up; they were going to make a move on" him. Thereafter Glavin (the object of other inmate hostility) was stabbed by an inmate not shown to be connected with Cassesso. Thereafter, for his own protection, Glavin was put in special custody. On cross-examination Glavin conceded that his talks with Cassesso "were to get information . . . about the Deegan matter," and that he was "pretending to go along . . . [with the 'cop out' proposal] to get the information for the FBI."

After the voir dire, the judge concluded that Glavin had been "approached to commit perjury, to admit . . . a murder that he did not commit and [that] he . . . [had been] led to believe that it was not merely an offer but a threat and that if . . . [Glavin] didn't go through with it . . . his own life would be imperiled." [31] The judge renewed his instructions that the testimony was admitted only against Cassesso. Glavin then gave before the jury

[31] Before the jury, Glavin quoted Cassesso as having asked what he thought about the "cop out" proposition. Glavin asked, "Do I have a choice?" Cassesso "just smiled." For discussion of the portion of the charge dealing with Glavin's testimony see part 14 of this opinion, *infra*.

essentially the same testimony as on the voir dire, except that, by explicit instructions of the judge, Glavin made no mention by name of the "office" or of Lammatino.

Cassesso contends that this testimony was inadmissible under *Massiah* v. *United States*, 377 U. S. 201. Massiah had been indicted on narcotics charges. He had a lawyer and had been released on bail. One Colson, whom Massiah regarded as a confederate, permitted a government agent to install a radio transmitter in Colson's automobile, so the agent could overhear incriminating conversations between Massiah and Colson. A majority of the Supreme Court held that Massiah's "own incriminating statements" thus obtained "could not constitutionally be used . . . as evidence against *him* at his trial." The present circumstances differ from those in the *Massiah* case in various respects.

(a) Before Glavin went to the F.B.I. at all, Ventola had told him essentially all the facts concerning Cassesso's "cop out" proposal. The principal significance of Glavin's direct conversations with Cassesso, after Glavin's talk with Agent Hanlon, was to confirm Ventola's authority to speak for Cassesso. Ventola's original proposal in no way was affected by any later F.B.I. instructions to Glavin. In the *Massiah* case, the incriminating evidence was obtained only by the enticed radio-monitored automobile talk. Thus, Glavin's talks with Cassesso were largely merely cumulative.

(b) Colson (in the *Massiah* case) took affirmative steps, presumably to lessen his own punishment, to elicit the conversations. Here Glavin was trying to protect himself from harm from Cassesso's criminal action initiated before he went to the F.B.I. He merely allowed and reported the continuance of Cassesso's criminal efforts. There was no entrapment. Cf. *Commonwealth* v. *Harvard*, 356 Mass. 452, 458–461.

Cassesso now relies on the reasonable measures, taken by the police to combat his own efforts to commit a further crime and to protect Glavin, as reasons for excluding evidence of those efforts as proof of his consciousness of guilt of the Deegan murder.

We are reluctant to believe that the Supreme Court majority in the *Massiah* case intended it to apply where public officers have obtained knowledge bearing upon old criminal conduct through reasonable efforts to protect the public interest and an individual from a new crime. Even an indicted defendant, in such circumstances, should be estopped to assert that the evidence cannot be used against him to prove the crime with which he is charged merely because he was not warned to have counsel present while he continued his criminal efforts to conceal that crime by obtaining the perjury of another.[32]

We recognize that some cases interpret the *Massiah* case very broadly. See e.g. *Hancock* v. *White*, 378 F. 2d 479, 482 (1st Cir.), which relies greatly on the Supreme Court's per curiam reversal of *State* v. *McLeod*, 1 Ohio St. 2d 60, by *McLeod* v. *Ohio*, 381 U. S. 356. See also *United States ex rel. O'Connor* v. *New Jersey*, 405 F. 2d 632, 634–638 (3d Cir.). Other decisions give the *Massiah* case limited application. See *Davis* v. *Burke*, 408 F. 2d 779, 782 (7th Cir.). See also *Caton* v. *United States*, 407 F. 2d 367, 373–374 (8th Cir.); *People* v. *Milani*, 39 Ill. 2d 22, 26–28 (fellow inmate but not a Federal agent at the time of an indiscreet disclosure by an indicted person); *Anders* v. *State*, 445 S. W. 2d 167, 170–172 (Tex. Cr. App.). In the unusual circumstances of Cassesso's new criminal conduct, Glavin cannot reasonably be regarded as a government agent of the type considered in the *Massiah* and *Hancock* cases.

12. The judge, after the voir dire, instructed Glavin not to use the words "office," "Cosa Nostra," or "they," in describing to the jury the persons responsible for, or connected with, the "cop out" offer. Because Glavin's testimony was admissible only against Cassesso, the judge (perhaps from excess of caution) wished to avoid any possible implication against other defendants in any degree associated with the "office" by earlier testimony.

[32] The conduct of Glavin and the F.B.I. is not like that discussed in *Miller* v. *California*, 392 U. S. 616 (see *People* v. *Miller*, 245 Cal. App. 2d 112, 141–144). The extent of Glavin's knowledge of the Cassesso offer, before he spoke with any F.B.I. agent, distinguishes this case from situations assumed in *Hoffa* v. *United States*, 385 U. S. 293, 308–312, or in *United States* v. *Missler*, 414 F. 2d 1293, 1302–1303 (4th Cir.). For our decisions dealing with the *Massiah* case see *Commonwealth* v. *Guerro*, 349 Mass. 277, 282. See also *Commonwealth* v. *Dougherty*, 343 Mass. 299, 303–305; *Commonwealth* v. *Sullivan*, 354 Mass. 598, 609. Cf. *Commonwealth* v. *McCarthy*, 348 Mass. 7, 11–12 (deliberate, direct police interrogation after indictment).

We have already discussed (see part 1 of this opinion) Baron's vague and general testimony about the "office." There was no clear evidence about what it was or who belonged to it. Baron's testimony did suggest some representation of the "office" by Limone, and that Tameleo had a somewhat greater but wholly indefinite authority to speak for it. At most, the evidence implied that these men either participated in some work of, or took some orders from, a group of significant size engaged in unspecified criminal activities.

We think that references to the "office," not more specific than the few references during Glavin's voir dire, would have had no necessary reference to Tameleo or Limone or to any other defendant. Glavin made no charge against any defendant, except Cassesso, by name. No individual was described as a member of the "office." See *Patriarca* v. *United States*, 402 F. 2d 314, 317 (1st Cir.). Had Glavin referred to the "office" in his testimony before the jury, it would have been pure conjecture that any reference to any other defendant was intended.[33] Indeed, to show criminality based on mere membership, some degree of active and specific criminal participation in the organization's activities normally would be necessary. See *Scales* v. *United States*, 367 U. S. 203, 224–228.

Cassesso contends, however, that limitations (to prevent mention of the "office") placed upon cross-examination unduly restricted his efforts to show Glavin's testimony to be false or inaccurate, e.g. (a) whether Cassesso had offered to

[33] One could hardly say that reference to the F.B.I. or the Internal Revenue Service by itself refers to a particular employee of those agencies. If one joins, takes orders from, or works for an ill-defined organization (e.g. the "Mafia," the "Cosa Nostra") which may have incurred public disrepute, one voluntarily risks that some opprobrium from a general reference to the organization will rub off on him. For a general discussion of such organizations, see Johnson, Organized Crime: Challenge to the American Legal System, 53 J. of Cr. L., Criminology and Police Science, 399; 54 *Ibid.* 1, 127.

get Glavin's sentence reduced and how he expected to perform this; (b) who was to pay $50,000; (c) who wanted Glavin to "cop out"; (d) who had "checked" out Glavin; and (e) the precise contents of each conversation. It is conjectural whether broader cross-examination would have suggested that it was unlikely that any payment for the "cop out" would be made, or that (if earned) the payments would necessarily have come from the same source as the $50,000 offered by Tameleo and Grieco to prevent Baron's testimony. Cassesso's counsel did ask questions which raised some of these issues. Questions which might have elicited an answer that the "office" supported the offers to Glavin were not allowed. The only relevance of the questioning was to show that others than Cassesso had an interest in the offers. Such an interest was shown in any event [34] and diminished the tendency of the offers to disclose consciousness of guilt on the part of Cassesso. Although we perceive no necessity for the judge's restriction, we see no prejudice.

MR. FITZGERALD'S TESTIMONY.

13. Mr. John Fitzgerald's testimony has already been summarized. He had represented Baron in early 1967. After Baron's coöperation with government authorities became known, Mr. Fitzgerald's automobile was bombed on January 30, 1968 (see fn. 5). News reports attached to the brief of Tameleo, Grieco, French, and Salvati show it to have been an unusually ruthless underworld atrocity.

When Mr. Fitzgerald appeared to testify on July 19, 1968, the defendants asked that the jury be polled to determine whether they had any memory from news accounts of the attack on Mr. Fitzgerald. The trial judge reasonably declined to put any such question at this late stage of the trial. The lapse of time since the bombing was just eleven days

[34] Glavin was allowed to testify that Cassesso said that, with "a new administration or a new parole board," an effort would be made, by someone other than Cassesso, to get Glavin's life sentence commuted. He was not permitted to say who (presumably "the office") was to do this. Similarly, Glavin testified that Cassesso told him that someone other than himself would pay the $50,000 but he was not permitted to say who that person was.

short of six months. Any inquiry would have called attention to an irrelevant matter and created a risk of prejudice where there was to be (and in fact was) no attempt to show that any defendant was in any way responsible for the bombing. See *Commonwealth* v. *Balakin*, 356 Mass. 547, 554. See also *Commonwealth* v. *Blackburn*, 354 Mass. 200, 203–205. The Commonwealth cannot be precluded from offering Mr. Fitzgerald's highly relevant testimony merely because some juror might suspect a connection between the defendants (all of whom were in custody on January 30, 1968) and the bomber. The case is unlike *Commonwealth* v. *Crehan*, 345 Mass. 609, 611–615, where news articles during a trial before a jury, not locked-up (as was this jury), gave indication that defendants had criminal records.[35]

14. Mr. Fitzgerald's testimony of conversations with Tameleo and Grieco, in July and August, 1967, was originally admitted against all the defendants. The judge, however, concluded that there was no adequate evidence of a continuing conspiracy against Stathopoulos in July, 1967, and very clearly limited the testimony (fns. 8, 9) as admissible only against Tameleo and Grieco and not against others.[36]

The judge, discussing in the charge these conversations, tried to combine in one sentence statements that Glavin's testimony was to be considered only against Cassesso and Mr. Fitzgerald's testimony only against Tameleo and Grieco. Efforts to correct possible confusion of names resulted in the charge being left, "[T]he evidence was admitted solely against them — Grieco and Tameleo . . . . That was in . . . Glavin's testimony." The judge obviously was referring not to Glavin's but to Mr. Fitzgerald's testimony.

[35] The articles here complained of, published over five months before the trial, dealt principally with the attack on Mr. Fitzgerald, not the conduct or the records of these defendants. Cf. *Worcester Telegram & Gazette, Inc.* v. *Commonwealth*, 354 Mass. 578, 580–581 (direct reference to sentence at Walpole being served by a defendant).

[36] The judge qualified his instruction by the words "unless and until they are connected." This did not restrict his adequate limiting instruction but merely allowed for the possibility that later testimony might render Mr. Fitzgerald's testimony admissible against one or more other defendants.

No further exception was saved by any defendant and it would seem that all counsel (if not the stenographer) understood what the judge said as not being confusing.

DENIAL OF DIRECTED VERDICTS.

15. Tameleo argues that, upon the evidence, he cannot be held as accessory before the fact to Deegan's murder because one who is only a conspirator is not guilty of the substantive offence which is the objective of the conspiracy, and that, to be so liable, one must "participate or aid in the commission of" the substantive offence. See *Commonwealth* v. *Stasiun*, 349 Mass. 38, 47–49. We assume that it is not possible to convict a defendant as an accessory before the fact because of mere acquiescence in the commission of a crime, without active participation as an actor by counselling, aiding, and abetting. See Am. Law Inst., Model Penal Code, § 2.06 (3), Proposed Official Draft, 1962, at one time numbered § 2.04, Tent. draft, No. 1, 1953, pp. 11, 20–50; Anderson, Wharton's Criminal Law & Procedure, § 110, pp. 237–238; Perkins, Criminal Law, 575–578, 593.

The offence of being accessory before the fact involves "counselling, hiring or otherwise procuring." See G. L. c. 274, §§ 2, 3 (see later amendments by St. 1968, c. 206, §§ 1, 2). This language means something more than mere acquiescence but does not require physical participation, if there is association with the venture and any significant participation in it.[27] See *Commonwealth* v. *Stout*, 356 Mass. 237, 240–241. See also *Commonwealth* v. *Bloomberg*, 302 Mass. 349, 352–356; *Commonwealth* v. *Geagan*, 339 Mass. 487, 517–519; *Commonwealth* v. *Doherty*, 353 Mass. 197, 203–205; *United States* v. *Peoni*, 100 F. 2d 401, 402–403

[27] See Perkins, Criminal Law, 593, "One of the greatest social menaces of the present day is the man who would be termed an accessory before the fact by the common law but in lay language is referred to as the 'brains' of a crime ring. He tends to put crime on a 'business basis', he recruits members of the 'profession', he provides the means by which crimes are perpetrated on an elaborate scale, and weapons so that death will result from any interference with his plans. The guilt of his terrified underlings, who carry out his commands because they dare not disobey, is certainly no greater than his."

(2d Cir.); *Russell* v. *United States*, 222 F. 2d 197, 198–199 (5th Cir.); *Winger* v. *United States*, 233 F. 2d 440, 441–442 (9th Cir. — accessory may work through an intermediary); *Massicot* v. *United States*, 254 F. 2d 58, 64–65 (5th Cir.); *White* v. *United States*, 366 F. 2d 474, 476 (10th Cir.). Cf. *Commonwealth* v. *Perry*, *ante*, 149, 152, (evidence showed only that defendant knew and associated with active participants before and after a robbery); *Morei* v. *United States*, 127 F. 2d 827, 831–832 (6th Cir.).

Baron's testimony warranted the conclusion that Tameleo was linked to the enterprise. He was charged (B–2, B–15) with knowledge of Limone's contract offers (B–1, B–11) as to both Deegan and Stathopoulos. He explained in some measure his reasons for wanting Deegan killed (B–2). He said of Deegan, "He definitely goes," and gave his "okay" to this murder and to the proposal to kill Stathopoulos. This could be inferred to be not mere approval but affirmative specific encouragement in circumstances which Tameleo should have realized removed existing barriers to carrying out the conspiracies. Fitzgerald's testimony about Tameleo's and Grieco's efforts to bribe Baron tended to show Tameleo's consciousness of guilt. From the testimony, the jury could infer that Tameleo adhered to the enterprises to kill both Deegan and Stathopoulos and that he furthered them by encouraging, and perhaps ordering, Baron to go forward with them.[28]

16. Limone, upon Baron's testimony, could have been found to have initiated the plan and to have paid for

[28] The judge in his charge said of the evidence concerning Tameleo, that Baron in effect said, "'. . . I am hired to kill Deegan, is that right?' And he said, 'That's right.' Well now, if you find that to be the truth, he is guilty of conspiracy. And there is testimony, if you accept it, that . . . [Baron] said to Tameleo, 'I understand the office wants to give me a contract to take care of Deegan, is that right?' 'That's right.' 'Well, I will do it if you say so. I won't if you don't,' or words to that effect. . . . There were words, to the effect, if you believe it, 'If you encourage me, if you induce me, if you command me and I get your approval, I will do it.' Well, that's a little more than a conspiracy. That's being an accessory before the fact. On the other hand, you may find the facts to be that . . . [Baron] said, 'I got a contract to kill Deegan.' It's like my telling you I'm going to break into a safe tomorrow and you say to me, 'Well, good luck to you.' You are not part of a conspiracy with me just because I tell you I am going to commit a crime. You are not encouraging me, you are not inducing me, you are not commanding me."

Deegan's murder. There thus was evidence that he not only conspired with Baron (and through Baron with the other defendants) to murder Deegan but also took affirmative action. See *Commonwealth* v. *Stout*, 356 Mass. 237, 240–241.

A "substantive offence and a conspiracy to commit that offence" each constitute a "distinct offence and each may be separately punished." See *Commonwealth* v. *Stasiun*, 349 Mass. 38, 48; Anderson, Wharton's Criminal Law & Procedure (1957 ed.), §§ 34, 110–111. The evidence concerning Limone warranted finding him guilty as an accessory before Deegan's murder and of each of the two conspiracy charges.[39]

17. Salvati was present in Cassesso's apartment when plans were made. He could have been found to have been with Baron and Cassesso on the evening of Deegan's murder, with a pistol, wearing a wig as disguise, and assisting Baron. He received pay of $750 for his night's work. Baron's testimony, if believed, reasonably permitted the inference that Salvati participated in not only the plan to kill Stathopoulos but also the closely related plan to kill Deegan.[40]

Miscellaneous Assignments Concerning Conduct of the Trial.

18. In argument the assistant district attorney commented on the failure of the defendants to call Mr. Farese who had attended conferences with Mr. Fitzgerald and Grieco. Upon objection, the judge explained that where "a witness is available to either side, then neither side can comment on it." He said that, because Cassesso's attorney had "said he was going to call him . . . and . . . didn't"

[39] Nothing in *Commonwealth* v. *Favulli*, 352 Mass. 95, 108–110 (discussing bribery and a conspiracy to bribe) has any relation to the type of charges now before us. See Anderson, Wharton's Criminal Law & Procedure, § 89; Perkins, Criminal Law, 535–536.

[40] The ample evidence of conspiracy and of presence and participation warranted the denial of Cassesso's motion for directed verdicts (and also Grieco's and French's similar motions, assignments of error as to which do not appear to be argued by them).

the comment was justified. Mr. Farese could have been called by the Commonwealth as well as by Cassesso. The judge's explanation put the argument in proper context, and the judge expanded upon this explanation in his charge. See *Commonwealth* v. *Webster*, 5 Cush. 295, 316; *Commonwealth* v. *Domanski*, 332 Mass. 66, 70–71; Anderson, Wharton's Criminal Evidence (12th ed.), §§ 144–145. There was no prejudice. See *United States* v. *Dibrizzi*, 393 F. 2d 642, 646 (2d Cir.).

19. During Baron's direct testimony he was asked about a conversation with Grieco about March 7, 1965, after the latter's alleged return from Florida. Five attorneys objected. The judge said, "I am going to ask the jury to draw their own inferences from the interruptions. . . . [I]f the purpose . . . is to break the narration . . . that's one thing. . . . I'd like to have the jury get the evidence which is admissible." In the preceding twenty-five pages of the transcript there had been numerous exceptions and also many objections without claiming an exception. Some of these objections seem to have been repetitive. The judge obviously thought that the orderly course of the testimony was being unduly broken.

Neither the judge nor counsel should make adverse comment on reasonable objections by counsel. See *Commonwealth* v. *Balakin*, 356 Mass. 547, 551, and cases cited. In context, the trial judge's remark was not criticism of ordinary or reasonable objections, but merely a comment, in effect, that the defence objections had been unduly frequent. The remark, in the middle of a long trial (fn. 2), amounted only to an admonition to avoid unnecessary delay and interruption. The matter was adequately dealt with in the charge, in the circumstances. *Commonwealth* v. *McLaughlin*, 352 Mass. 218, 226–229.[41] This resembled the

[41] The judge charged, among other things, ". . . you are to judge this case purely by what you hear within the four walls of this courtroom. Judge the parties; judge the witnesses; judge the officers; yes, even the presiding justice. Examine them all. Make your own impressions. . . . [J]udge the attorneys, also, in their conduct. . . . The duty of a judge is to be the directing head of a trial. He is cognizant of the . . . responsibility . . . on . . .

corrective charge approved in *Commonwealth* v. *Lewis*, 346 Mass. 373, 379, fn. 2.

20. Cassesso's counsel refers to a number of instances in which he accuses the trial judge of making "disparaging" and "intemperate" comments about defence counsel. He argues that the cumulative effect was to deny Cassesso a fair trial. The record indicates that the trial judge tried to keep the trial on an orderly course and to avoid prejudicial occurrences. We perceive no justification for Cassesso's contention about cumulative error in any of the specific instances referred to in Cassesso's brief as supporting the contention. Indeed, in at least one instance, Cassesso's counsel persisted in disregarding the judge's instructions to examine his witness "without putting the words in his mouth." In this long trial, which must have taxed judicial patience (see *Commonwealth* v. *Lewis*, 346 Mass. 373, 379), we do not perceive judicial conduct in any degree comparable to that criticized in the cases relied on by Cassesso. See e.g. *Bursten* v. *United States*, 395 F. 2d 976, 982–987 (5th Cir.). See also *United States* v. *Guglielmini*, 384 F. 2d 602, 604–605 (2d Cir.).

ADDITIONAL MATTERS RELATING TO THE CHARGE.

21. Certain defendants contend that the judge should have charged that the testimony of Baron, obviously an accomplice, must be "received with suspicion and acted upon with great caution." The judge in fact charged, "[A] person who admits himself to be an accomplice of a crime is a criminal himself, and that in itself raises a question, but that does not mean that you cannot believe an accomplice. The evidence of an accomplice need not be corroborated by other witnesses. Whether you should believe it . . . remains for you to say."[42] A trial judge may tell the jury to scrutinize the testimony of an accomplice with care, especially when the testimony is not corroborated. See *Commonwealth* v. *Giacomazza*, 311 Mass. 456, 464. He is not required to do so. See *Commonwealth* v. *Binkiewicz*, 342 Mass. 740, 752–753. See also *Commonwealth* v. *Lammi*, 310 Mass. 159, 164–165; *Commonwealth* v. *Geagan*, 339 Mass. 487, 518.

The judge properly did not charge that Mr. Fitzgerald's testimony should be viewed with caution on the ground that he might conceivably have been found to have been an accessory after the fact.

22. Tameleo argues that the judge should have told the jury to disregard all evidence introduced after Tameleo rested at the close of the Commonwealth's case, when his motion for a directed verdict was denied. The argument relies on the following circumstances.

In the course of a long conference, with the jury absent, the judge, although Tameleo had rested or was about to rest, required him and his counsel to remain thereafter during the trial in the court room. This they did. The assistant district attorney, in the course of this conference, made it plain that he, by cross-examination of witnesses called by the defence, would continue efforts to establish Tameleo's guilt. He said that he would tell Tameleo's counsel "right now that I intend to elicit from them [i.e. defence witnesses], if I can, evidence that will definitely incriminate . . . Tameleo." He was explicit in requesting that Tameleo's counsel be present "because in the cross-examination of witnesses, I definitely intend to ask them if they know that man." The judge, in answer to a statement of the assistant district attorney "that the Commonwealth can always open up its case again and . . . put in further evidence against"

each attorney, and sometimes it is not an easy matter to maintain discipline. . . . But now let me say — Don't punish the clients for the acts of the attorneys, not unless the clients have something to do with it. The attorneys are here as officers of the Court, entrusted with a great responsibility. The attorneys are not on trial. The defendants are on trial. You are to bring in verdicts for or against the defendants — not the attorneys."

[42] The judge then referred to the Commonwealth's contention "that there was plenty of corroboration" and indirectly to the then recent arguments which, for the defence, had been that there was no corroboration. The judge then said, "[I]f you are . . . convinced beyond a reasonable doubt that the defendant is guilty, you can find that defendant guilty even on the uncorroborated testimony of an accomplice . . . who is not on trial."

Tameleo, agreed that such action was "in the discretion of the [c]ourt" and later said, "that as far as . . . Tameleo is concerned, the case is closed unless there is other evidence that may be introduced against him. And I will have to admit it if it comes in."

Obviously, in this joint trial of several defendants under conspiracy, murder, and accessory indictments arising from the same events, the jury could not proceed at once to decide the charges against Tameleo separately. In our opinion the judge correctly required the continued attendance of Tameleo and his counsel. We think also that the judge had the discretion to receive, and to state that he would receive, against Tameleo any later evidence concerning him which might be brought out through defence witnesses. His discretion was not abused by the course adopted. See *Commonwealth* v. *Eastman*, 1 Cush. 189, 217; *Commonwealth* v. *Wood*, 302 Mass. 265, 267–268. See also *Commonwealth* v. *Agiasottelis*, 336 Mass. 12, 15; *Commonwealth* v. *Greenberg*, 339 Mass. 557, 583; *Commonwealth* v. *Fancy*, 349 Mass. 196, 204. In the circumstances, it remained Tameleo's counsel's duty to bring to the judge's attention promptly and as they arose any matters which he deemed prejudicial to his client. In any event, the matters arising after Tameleo rested (see e.g. fn. 23, *supra*), referred to as harmful to Tameleo in the brief for his client and others, do not appear to be of great significance.

23. In considering whether, in these capital cases, any action is appropriate under G. L. c. 278, § 33E (as amended through St. 1962, c. 453), we give weight to the fact that the principal issue before the jury was one of Baron's credibility. On Baron's testimony alone, if the jury reasonably accepted it, there is no necessity for action by us under § 33E, despite the numerous assignments of error which have been argued.

We, of course, did not hear Baron's testimony. It is before us only in written form. We would hardly expect in a case like this to find that each key witness had a spotless reputation. We recognize, as the jury doubtless did, that Baron

and Stathopoulos had various possible incentives and motives for testifying. They obviously hoped to obtain mitigation of potential punishment for various offences. They presumably wished to assure themselves of continuing police protection. Baron had a long criminal record and "was a highly vulnerable witness." See *Patriarca* v. *United States*, 402 F. 2d 314, 319 (1st Cir.). The record of Stathopoulos was less serious.

Mr. Fitzgerald also understandably may have entertained hostility toward Tameleo and Grieco (against whom his testimony was admitted). He may have suspected their friends of having caused him serious injury (see fn. 5). Cassesso's conviction may have depended to some extent on the testimony (admitted only against him) of Glavin, who also had a serious criminal record. Glavin's testimony, of course, could have been affected by self-interest.

These witnesses (Baron, Stathopoulos, Glavin and Mr. Fitzgerald) were before the jury for long periods. The jury saw and heard them. The jurors, when they retired to deliberate, were in a far better position to appraise the witnesses and what was said than we now are. They had heard full discussion of all imaginable infirmities in the vital testimony of these witnesses. They were warranted in believing the testimony. Accordingly, nothing in the record indicates to us reason for exercising any special powers given to us by § 33E.

24. Questions argued which seem to us of lesser importance are discussed in the Appendix, as already noted.

Judgments affirmed.

APPENDIX.

Various less significant issues raised by assignments of error are discussed in this Appendix.

Miscellaneous Proceedings before Trial.

A-1. There was no error in following the usual Massachusetts practice of furnishing the defendants with the names of witnesses before the grand jury. *Commonwealth* v. *Jordan*, 207 Mass. 259, 264. The defendants could move for access to any witnesses in protective or other custody (see *Commonwealth* v. *Doherty*, 353 Mass. 197, 211; see also *Commonwealth* v. *Balliro*, 349 Mass. 505, 515–518) and might show specific need for the judge to exercise his discretion to afford them further information about other witnesses. It was wholly reasonable for the judge and the Commonwealth to be apprehensive about the safety of witnesses (see fn. 5). No statute (cf. 18 U. S. C. § 3432 [1964]; *Gregory* v. *United States*, 369 F. 2d 185, 187–188 [Ct. App. D. C.]) required furnishing the defendants the names and addresses of prospective witnesses.

A-2. The trial judge was not required to grant motions for inspection of exculpatory evidence, or of the results of scientific and other examinations made in connection with the case, in the absence of greater specification of the areas of desired inquiry. See *Commonwealth* v. *Noxon*, 319 Mass. 495, 534–535. Similarly, there was no adequate specification of evidence illegally obtained to which the defendants desired access. There was no later indication that evidence, offered by the Commonwealth, had been illegally obtained.

A-3. The trial judge within his discretion denied motions for access to police reports. See *Commonwealth* v. *Marsh*, 354 Mass. 713, 721–722. See also *Commonwealth* v. *Roy*, 349 Mass. 224, 227. Even if the reports constituted public records (G. L. c. 4, § 7, Twenty-sixth, as amended through St. 1962, c. 427, § 1; see St. 1969, c. 831, § 2), a question which we need not decide, other remedies existed. See *Lord* v. *Registrar of Motor Vehicles*, 347 Mass. 608, 610–612. See also G. L. c. 66, § 10, as amended through St. 1948, c. 550, § 5. A police report, specified as of possible significance, was that of a police captain (see fn. 7). That report was in fact produced at trial.

A-4. In the absence of adequate showing that any written statement was taken from any defendant, or that Baron signed any such statement, there is no basis for contending that the judge abused his discretion by denying motions in advance of trial for examination of such statements. See *Commonwealth* v. *Chapin*, 333 Mass. 610, 617–618; *Commonwealth* v. *Ries*, 337 Mass. 565, 583. See also *Walsh* v. *United States*, 371 F. 2d 436, 437 (1st Cir.), cert. den. 387 U. S. 947. Cf. *Commonwealth* v. *Giles*, 353 Mass. 1, 18–19 (allegedly criminal testimony in perjury cases). The judge prior to trial indicated that he would make any such statements available when Baron took the stand. The motions were renewed at trial, but arguments on these then were confused with discussion of requests for Baron's grand jury testimony. Even then, there was no showing of the existence of any written statements by Baron.

A-5. There was no abuse of discretion in the denial of motions to interview Stathopoulos and Baron in advance of trial. Each was interviewed by the judge in the presence of defence counsel. Each said that he did not wish to be interviewed. See *Commonwealth* v. *Doherty*, 353 Mass. 197, 210–211.

A-6. The trial judge also denied motions to have the assistant district attorney inform defence counsel of the whereabouts of Mrs. Baron so that she could be interviewed. The assistant district attorney, on May 6, 1968, represented that she was in "protective custody [of Federal authorities], although . . . free to come and go."

On May 27, 1968, Mrs. Baron filed an affidavit that she did "not want to be interviewed by any [defendants'] lawyers." Abuse of discretion has not been established. The defendants have not shown that they asked Federal authorities to permit them to talk to Mrs. Baron. She was not in State custody. Cf. *Commonwealth* v. *Carita*, 356 Mass. 132, 142–143.

A-7. The trial judge was not obliged to require the Commonwealth to furnish any pre-trial information concerning the motives which might lead any proposed witness to testify. Baron, Stathopoulos, and Glavin all were available for, and subjected to, extensive cross-examination.

A-8. Action on Cassesso's motions for particulars was within the sound discretion of the trial judge. See G. L. c. 277, § 40. See *Commonwealth* v. *Bartolini*, 299 Mass. 503, 509; *Commonwealth* v. *White*, 353 Mass. 409, 412–413, cert. den. 391 U. S. 968; *Commonwealth* v. *Baron*, 356 Mass. 362, 364–365, and cases cited.

Although the motions were denied as having been filed late, the indictments were substantially in the statutory forms and were adequate. See G. L. c. 277, § 79 (accessory before the fact, murder, and conspiracy). See *Commonwealth* v. *Norton*, 339 Mass. 592, 593.

A-9. The trial judge was not required to conduct a public opinion poll of the community to determine whether the defendants could receive a fair trial. See *Commonwealth* v. *Blackburn*, 354 Mass. 200, 204–205.

A-10. Other pre-trial contentions of the defendants need not be discussed.

Questions Relating to the Jury.

A-11. Baron filed a plea of guilty to the conspiracy indictments on May 27, 1965, just as the trial began and before the jury had been selected. To avoid inappropriate publicity, the trial judge might well have accepted the plea after the jury had been empanelled and sequestered. This was within his discretion. *Commonwealth* v. *Sousa*, 350 Mass. 591, 595. *Commonwealth* v. *Subilosky*, 352 Mass. 153, 161–162. Baron's plea could hardly have been kept from the jury. He admitted in his testimony full complicity in the project of killing Deegan and Stathopoulos. Any newspaper publicity about the plea cannot have been prejudicial. The judge in his charge sensibly told the jury what intelligent jurors already must have inferred. Cf. *Commonwealth* v. *Giacomazza*, 311 Mass. 456, 470.

A-12. The trial judge had discretion (see *Commonwealth* v. *Geagan*, 339 Mass. 487, 504) to excuse veniremen in the absence of the defendants and counsel. See G. L. c. 234, § 1A (inserted by St. 1949, c. 347, § 2); *Joyce* v. *Hickey*, 337 Mass. 118, 122–123.

A-13. *Witherspoon* v. *Illinois*, 391 U. S. 510, 515, was decided on June 3, 1968, while this jury was being selected. Limone on June 4 waived exceptions previously saved to the judge's action in excusing jurors without adequately exploring their views on capital punishment. His counsel argues that later the judge improperly excluded some jurors, even though he appears to concede that "thereafter the judge excluded only those . . . who said that they could not vote for the death penalty." In his brief, Limone has not specified any juror whom he claims was improperly excluded under the principles reviewed in *Commonwealth* v. *Sullivan*, 354 Mass. 598, 608–609, cert. den. 393 U. S. 1056. See *Commonwealth* v. *Nassar*, 354 Mass. 249, 255–257.

The judge's action in excusing fourteen veniremen, specified by Limone, is not shown to have been arbitrary. The judge saw those excused. He was entitled to exercise judgment, within a substantial range of discretion, concerning the capacity and suitability of each of them intelligently to perform the functions of a juror. The judge did not abuse this discretion in determining that five specified jurors stood indifferent. An exempt temporary teacher of woodworking in the public schools (see G. L. c. 234, § 1, as amended through St. 1949, c. 347, § 1; see later amendment, St. 1969, c. 148, § 1) was not precluded from serving. See cases discussing whether to set aside a verdict in which an exempt juror has joined, *Munroe* v. *Brigham*, 19 Pick. 368, 369–370 and *Moebs* v. *Wolffsohn*, 143 Mass. 130, 131. See also *Commonwealth* v. *Hayden*, 163 Mass. 453, 455; *King* v. *United States*, 346 F. 2d 123, 125 (1st Cir.). A State employee (director of social services of the Massachusetts Commission on Aging) does not seem to us the type of person automatically to be disqualified for bias in a criminal case by reason of his office. *United States* v. *Wood*, 299 U. S. 123, 132–141. *Dennis* v. *United States*, 339 U. S. 162, 168–172. Cf. *Boston* v. *Baldwin*, 139 Mass. 315, 317 (member of Boston com-

mon council disqualified in a city case); *Commonwealth* v. *Moore*, 143 Mass. 136, 138–140 (member of city league to enforce law and order disqualified to sit as juror in prosecution initiated by the league's agent).

A–14. The judge reasonably dealt with the complaints of certain defendants about the conduct of a court officer, who, during the selection of the jury, reported to the judge the inquiry of a juror, thereafter excused (see *Commonwealth* v. *Monahan*, 349 Mass. 139, 159–160), about his possible disqualification. The judge was not required to believe affidavits of the defendants concerning other conduct of the same court officer. Cf. *Mattox* v. *United States*, 146 U. S. 140, 149–151. Cf. also *Woodward* v. *Leavitt*, 107 Mass. 453, 458–459, 471.

A–15. The judge could properly make inquiry (during trial and long before the case was sent to the jury) of the foreman, in the court room but in the absence of counsel, whether the locked-up jury had any suggestions or complaints concerning their care and treatment. Cf. *Sargent* v. *Roberts*, 1 Pick. 337, 339–342 (communication between judge and jury during jury deliberation); *Lewis* v. *Lewis*, 220 Mass. 364, 366–371 (same).

A–16. It was of no consequence that, by what appears to have been a sheer accident, a witness and the jury passed each other in the same stairwell during a recess.

A–17. The judge did not abuse his discretion in excusing veniremen who had read an article or articles in a Chelsea newspaper. One bore the headline "Baron Pleads Guilty to Participating in Local Gangland Slaying" and referred to a somewhat obscure court room colloquy between defence counsel and Baron. Although the articles do not seem very prejudicial, the judge could reasonably conclude that jurors who had read them should be excused.

QUESTIONS CONCERNING DEFENDANTS' TESTIMONY.

A–18. On cross-examination, Limone was asked questions about his vending machine business. The matter had been opened up on direct examination. Questions concerning his cash available on March 13, 1965, from the sale of the business or otherwise, may have had some significance. See par. A–32, *infra*.

On direct examination Limone denied that he had "engaged in any loan sharking." It was permissible on cross-examination to inquire whether Limone was a "shylock" in 1965, in view of (1) an earlier admission of the receipt of interest on "cash personal loans," and (2) Baron's testimony about having paid Limone such interest or "vigorish." To most of these questions no exception was saved, including a question whether Limone had a license to lend money. See G. L. c. 140, § 110 (as amended through St. 1962, c. 795, § 2; see later amendment by St. 1967, c. 196); *Commonwealth* v. *Douglas*, 354 Mass. 212, 219. This does not appear to have been a prejudicial inquiry beyond the discretion of the trial judge. See discussion in *Commonwealth* v. *Binkiewicz*, 342 Mass. 740, 754–756.

Questions concerning the "dog house" may have had relevance (cf. *Jones* v. *Commonwealth*, 327 Mass. 491, 492–497) in view of Baron's testimony about meeting Limone near that place and being offered a "contract" represented as approved by the "office." In any event, a question whether the "dog house" was "a meeting place for the Cosa Nostra" was answered in the negative. A mistrial was not required merely because of use of the term "Cosa Nostra." See part 12 of this opinion.

Subject to Limone's exception, he was asked to tell "some of the other people that . . . [he had] hung around with . . . [at the dog house] in . . . 1965." This led to mention of one Gennaro Anguillo who, at the time of this trial, had recently been acquitted in a trial "during which he had been portrayed in the Boston press as a leader of the underworld." The impropriety, if any, was not seasonably brought to the attention of the trial judge by prompt exception.

A–19. We cannot say that the trial judge abused his discretion about the scope of cross-examination concerning matters conceivably bearing upon the truth of Grieco's alibi testimony that he was in Florida in March, 1965. There

were no exceptions to many questions discussed in the defendants' joint brief.

A–20. Mr. Fitzgerald, in describing his conversations with Tameleo and Grieco, gave testimony, clearly hearsay, about facts then discussed (e.g., Baron's motives for testifying) which he must have learned from Baron and Stathopoulos. Most of this testimony was cumulative of testimony already given. No request for any limiting instruction was made when the trial judge denied Tameleo's motion that Mr. Fitzgerald's answer concerning Baron's motives be struck.

A–21. Baron and Stathopoulos waived the attorney-client privilege to permit Mr. Fitzgerald to testify. French did not give such a waiver. Mr. Fitzgerald gave cumulative testimony that he observed blood on French's clothing and shoe at the Chelsea police station on the night of March 12–13, 1965. No attorney-client privilege extends to appearances or acts observed by others and not in confidence. *State* v. *Fitzgerald*, 68 Vt. 125. *Brown* v. *Foster*, 1 H. & N. 736, 739–740. See *Colton* v. *United States*, 306 F. 2d 633, 636–637 (2d Cir.), cert. den. 371 U. S. 951; *United States* v. *United Shoe Mach. Corp.* 89 F. Supp. 357, 358–359 (D. Mass.); Wigmore, Evidence (McNaughton rev.) § 2306 (pp. 589–590), § 2311 (pp. 601–602); McCormick, Evidence, §§ 92–95. Cf. *Robson* v. *Kemp*, 1 Esp. 233, 235 (K.B.).

MISCELLANEOUS TRIAL MATTERS.

A–22. Cassesso's counsel had obtained from another Superior Court judge Glavin's testimony before a Norfolk County grand jury in connection with indictments of Cassesso and others for attempting to get Glavin to commit perjury. Cassesso's counsel was permitted on various occasions to use these minutes (marked for identification) to refresh Glavin's recollection. He was not allowed to use the minutes themselves to show Glavin's prior inconsistent statements, unless and until he proved the minutes in usual course.

The judge permitted wide questioning about the prior statements. Cassesso's counsel did not make an attempt to prove, through the stenographer or otherwise, any prior inconsistent statements before the grand jury. He cannot now complain. *Commonwealth* v. *Doherty*, 353 Mass. 197, 210.

A–23. There was no error in refusing to allow Tameleo's counsel to cross-examine Glavin on the voir dire. Glavin's testimony was admissible only against Cassesso. Cassesso's counsel had cross-examined Glavin. The extent of cross-examination on the voir dire, by counsel for the defendants against whom the evidence was not admitted, was a matter within the discretion of the judge. *Commonwealth* v. *Morrell*, 99 Mass. 542, 545. See *Commonwealth* v. *Hall*, 164 Mass. 152, 154–155; Wigmore, Evidence (3d ed.) § 1385; McCormick, Evidence, § 53, pp. 122–126. See as to cross-examination generally, *Commonwealth* v. *Nassar*, 351 Mass. 37, 43–44; *Commonwealth* v. *Nunes*, 351 Mass. 401, 405–406.

The judge in his discretion could require counsel for the defendants other than Cassesso to proceed at once (if they were to do so at all) to cross-examine Glavin before the jury. They had heard Glavin's direct testimony and cross-examination, both before the jury and at voir dire. See Wigmore, Evidence (3d ed.) § 783, p. 150, fn. 3.

A–24. At the close of the defendants' cases, Cassesso's counsel sought to recall Glavin (as Cassesso's witness) to examine him (a) about certain testimony in his trial in Worcester County for the murder of a person other than Deegan, which tended to show that, when arrested for that crime, he had been afraid that the "mob" would have somebody at Bridgewater or Walpole kill him (cf. his testimony in the present case that he had been "checked out" in behalf of Cassesso as to his reliability for carrying out the "cop out" project), and (b) to prove a certified copy of the Norfolk grand jury minutes prior to Cassesso's and Ventola's indictments for trying to suborn perjury by Glavin. As noted above, there had already been extensive cross-examination of Glavin concerning these minutes. Examination of the material, attached to the request to recall, on short notice, Glavin (who was in protective custody "two and a half hours away from" Boston), does not show that it was of such sig-

nificance as to necessitate further delay at the end of a long trial. See Anderson, Wharton's Criminal Evidence (12th ed.), § 899.

A–25. Cassesso was not deprived of proper opportunity to show that Glavin was not removed to protective custody solely because of his fear of Cassesso. In cross-examination, Cassesso's counsel was permitted reasonably to inquire about an attack on Glavin by another inmate. The judge was not required to force Glavin to disclose who stabbed him where Glavin had testified that the person was not either Cassesso or Ventola and where it was represented that disclosure of the name might result in injury to the person concerned.

A–26. There was no error in the reception by the judge from the district attorney of a memorandum (not furnished to the defendants or received in evidence or marked for identification) apparently concerning questions of evidence likely to arise during trial. This procedure apparently arose out of a suggestion during a conference at which defence counsel were present. No objection to the suggestion was voiced by any counsel.

A–27. Various incidental remarks were made by witnesses and counsel, some of which should have been left unsaid. Exceptions saved to incidents of the proceedings must be viewed in the perspective of a long trial (see fn. 2) conducted for well over a month during hot July weather. As in *Commonwealth* v. *Lewis*, 346 Mass. 373, 378–380, it would unduly "prolong this opinion to discuss" these in detail. See part 5 of opinion.

Some cross-examination unduly baited Baron, as a witness, and the assistant district attorney, into inappropriate remarks. These include an understandably exasperated protest by the assistant district attorney at Grieco's attorney's cross-examination of Baron, obscure references to a request by Limone's counsel for grand jury minutes, and a remark by the prosecutor when he reasonably thought counsel for Cassesso was trying to avoid the judge's instructions on the cross-examination of Glavin. A reference by the assistant district attorney to "grand jury testimony in another case where this man [Cassesso] is presently a defendant" was not very clear. The judge promptly instructed the jury that it be disregarded. The assistant district attorney's reference to a question by Cassesso's counsel as a "[t]rick question" was prompted by counsel's inquiry in a manner which the assistant district attorney reasonably feared would mislead the witness. See *Commonwealth* v. *Geagan*, 339 Mass. 487, 515–518 (remarks warranted by prior remarks on evidence); *Commonwealth* v. *Subilosky*, 352 Mass. 153, 167–168. See also *Commonwealth* v. *Lewis*, 346 Mass. 373, 379. No prejudice has been established.

A–28. Carmine Puopolo failed to respond to a summons "left at" his house. The judge offered to issue a capias. The assistant district attorney declined the offer because he did not wish to "delay the case any longer." In argument, however, he started a rhetorical question, "Is it coincidental . . . that when the Commonwealth calls . . . Puopolo, he's not anywhere to be – –" The argument was interrupted and was never finished. It thus was not prejudicial.

A–29. During his argument the assistant district attorney reviewed Baron's reasons for going to see Tameleo. He then said, "Of course you have to use your imagination. There are many things in a court of law that can't be introduced." The sentence last quoted was not proper (see *Kitchell* v. *United States*, 354 F. 2d 715, 719 [1st Cir.]) but the judge promptly gave adequate corrective instructions. See *Commonwealth* v. *Cabot*, 241 Mass. 131, 150–151.

The assistant district attorney shortly thereafter said, "I expect a lot of interruptions." Objection was made. By itself the remark was not significant enough to constitute improper comment on reasonable objections by the defence. *Commonwealth* v. *Balakin*, 356 Mass. 547, 550–551. In any event, no exception was saved.

A–30. In argument the assistant district attorney referred to Baron's testimony that he met Cassesso in Florida, and then said, "There's no denying by anyone that . . . Cassesso was not there." This cannot be interpreted as comment on Cassesso's failure to take the stand. Any person who had seen Cassesso elsewhere at the designated time could have testified to the fact, for it was not within Cassesso's exclusive knowledge. See *Commonwealth* v. *Gerald*, 356 Mass. 386, 391–392.

A–31. The judge reasonably stopped cross-examination of Stathopoulos, by Limone's counsel, which he thought to reflect unfairly on the behavior of the witness. *Commonwealth* v. *Lewis*, 346 Mass. 373, 379. A question had suggested that the witness was looking at the assistant district attorney for help with each question. The judge said, "There's no evidence whatever of that. The [c]ourt has been watching. That is a false statement."

Similarly, the judge did not abuse his discretion by requiring counsel on cross-examination to refer to xerox copies as such instead of treating them as originals. If the judge, in referring to the question as "false" spoke with unnecessary force, any error was trivial.

A–32. Limone, on cross-examination, was asked about his use of $51,500 in cash received by him in 1965 from the sale of a vending machine business. Baron had described himself as a "loan shark" or "shylock." There had been testimony that in 1965 Limone had lent money on personal and business loans (sometimes at twenty-four per cent a year) to bring him interest income of $2,100. When Limone's counsel objected to the inquiry the judge commented that it was "material whether this man was a money lender, also, the same type as he described . . . Baron . . . [w]hether the birds are of the same feathers or not. That's what he is trying to prove." The answers on cross-examination suggested (a) that Limone was not the hardworking small business operator which he had claimed to be on direct examination; (b) that he may have had closer association with Baron than Limone had admitted, if they in fact operated in the same business in the same area; and perhaps also (c) that Limone had cash available from which he could have paid $7,500 for Deegan's murder. The judge's casual remark was not, in context, to be construed as approving any theory of guilt by association. See par. A–18, *supra*.

A–33. The assistant district attorney in his opening asked the jury to look not only at the witnesses but "at the defendants during the course of this trial" for their "physical characteristics" and "with regard to the story that is told about them." On objection the judge permitted the remarks to stand and asked the "jury to look at the judge and all counsel and all parties . . . including the district attorney." These remarks amount to no more than a suggestion that the jurors carefully watch what was going on as an aid to appraising the evidence. See fn. 41.

A–34. On cross-examination, Cassesso's counsel asked Glavin certain questions which the judge thought might violate his instructions not to ask questions which might elicit answers containing references to the Cosa Nostra or the "office" or to other defendants against whom the answers were not admissible. At one point after suggesting the impropriety of the particular inquiry, the judge said, "You are not going to prejudice the rights of anyone else in this court room. Now, that is the reason why I am excluding it." Cassesso saved an exception. In context the judge's remark was a method of telling counsel to obtain his information in a manner which would not require mentioning defendants other than Cassesso.

A–35. The judge, in admitting certain evidence, said, "There is a higher court that reviews everything I do." After an exception, he added, "[E]verything I rule on is subject to review by . . . the Supreme Judicial Court. And I have also told . . . [the jury] that their decision, however, on the facts or as to who to believe . . . is not reviewed . . . that their word is final on that." These remarks were not likely to reduce the jury's sense of responsibility. The judge made it plain that the jury had the final decision of issues of fact and credibility. There was no error. Cf. *Commonwealth* v. *Ladetto*, 349 Mass. 237, 247–248 (improper reference to possible executive clemency adequately corrected by charge); *State* v. *Clark*, 227 Ore. 391, 393. Cf. also *Pait* v. *State*, 112 So. 2d 380, 384–386 (Fla.); *Faust* v. *State*, 222 Ga. 27, 29; *People* v. *Esposito*, 224 N. Y. 370, 376–377; *People* v. *Silverman*, 252 App. Div. (N. Y.) 149, 174; annotations, 3 A. L. R. 3d 1448; 5 A. L. R. 3d 974.

A–36. Toward the close of a hot day, the trial judge declined to suspend the trial at 4 P.M. but insisted that cross-examination by Cassesso's counsel of Glavin, then on the stand, be completed that afternoon. "We are not going to start all over tomorrow and have him repeat the same questions." Judicial comment upon "unusually protracted" cross-examination has been held per-

missible. *Commonwealth* v. *Coughlin*, 182 Mass. 558, 564. See *Smith* v. *Boston Elev. Ry.* 208 Mass. 186, 187. See also *Guinan* v. *Famous Players-Lasky Corp.* 267 Mass. 501, 525; *LaCroix* v. *Zoning Bd. of Appeals of Methuen*, 344 Mass. 489, 490. It was for the judge to determine, within a wide range of discretion, whether there was chance of completing that day cross-examination of a particular witness and the manner in which he would encourage avoidance of repetition.

MATTERS CONCERNING THE CHARGE.

A–37. The judge read from *Commonwealth* v. *Webster*, 5 Cush. 295, 319, the paragraph concerning alibi testimony. He also charged with respect to proof by the Commonwealth of guilt beyond a reasonable doubt and made it clear that the burden of such proof rests upon the Commonwealth and not upon a defendant. There was no error. See *Commonwealth* v. *Geagan*, 339 Mass. 487, 518; *Commonwealth* v. *Nassar*, 351 Mass. 37, 49; *Commonwealth* v. *Rogers*, 351 Mass. 522, 532; *Commonwealth* v. *Sullivan*, 354 Mass. 598, 607–608. The rule of the *Webster* case does not shift to the defence the burden of proving an alibi or lack of guilt. Cf. *Stump* v. *Bennett*, 398 F. 2d 111, 121–122 (8th Cir.), cert. den. 393 U. S. 1001. The Iowa rule discussed in the *Stump* case was construed in *Johnson* v. *Bennett*, 393 U. S. 253, 255, as "shifting to the defendant the burden of proving an alibi defense." See *S. C.* on remand, 414 F. 2d 50, 51–57 (8th Cir.).

A–38. The judge told the jury that a unanimous verdict was required to "assure . . . consideration of every bit of evidence." Stubbornness, he said, "has no place in the jury room; but, at the same time, each of you should vote as your conscience dictates, and your conscience alone." He told them of their duty to explain their own views to others of the jury and to consider the views of others. He pointed out the consequences of a mistrial and the lack of assurance that any other jury would do better. He urged them to "do your best, without prejudicing your own conscience, to reach a unanimous verdict." The defendants contend that this was improper inclusion, in the original charge, of the substance of *Commonwealth* v. *Tuey*, 8 Cush. 1, 2–3. The judge's remarks were appropriate statements of the duty of jurors. See *Commonwealth* v. *Rollins*, 354 Mass. 630, 636–639.

A–39. The judge discussed the crime of conspiracy. "That," he said, "is practically the simplest crime to commit and yet one of the most difficult to prove, at times." In context, it is plain that the judge was merely referring to the ease with which an agreement to commit a crime may be made and to the difficulty of proof of that agreement by direct and circumstantial evidence. We perceive no merit in the contention that this encouraged the jury "to shift or ameliorate the Commonwealth's burden of proof." The charge on that burden was plain.

A–40. In defining murder, the judge first read to the jury G. L. c. 265, § 1, and defined malice aforethought. He then said that if the jury believed "the contention of the Commonwealth, that this Deegan murder was planned in advance, it is murder in the first degree." He made it clear, however, that, if they saw fit to do so, they could return a verdict of murder in the second degree even if "there [was] a plan in advance to kill Deegan." He had previously said that "the jury have the power to decide the degree of murder." This adequately stated the law. See *Commonwealth* v. *Chase*, 350 Mass. 738, 743–744; *Commonwealth* v. *Rollins*, 354 Mass. 630, 633–635. Cf. *Commonwealth* v. *McCauley*, 355 Mass. 554, 557–561.

A–41. The judge charged that "once there is a conspiracy in existence, anything that any member of the conspiracy does or says in furtherance of the objective of that conspiracy binds all of them . . . . [O]nce the conspiracy is over, then what one does does not bind anyone else but himself." The judge was discussing only the crime of conspiracy and was addressing himself only to the conversations with individual defendants in 1967, when the conspiracies to kill Deegan and Stathopoulos had terminated. The language, as used, was not contrary to the principle quoted in *Commonwealth* v. *Stasiun*, 349 Mass. 38, 49, that a conspirator is not "as matter of law an

aider . . . in the perpetration of the crimes whose commission he has agreed with others to accomplish."

The judge shortly thereafter made clear the meaning of the term "accessory before the fact." That term, he said, "means that a person [who], before the killing of . . . Deegan, did *incite, procure, aid . . . advise . . . hire or command* the killers to do the killing. . . . Now, any one of these men . . . who in any way *helped to bring about the death of Deegan* by the one who killed Deegan, one or ones [who] *helped, incited* or *procured*, counseled *in the killing* . . . would be guilty. . . . [I]f you accept the contention of the Government . . . you would be warranted in returning a verdict of guilty of accessory before the fact" (emphasis supplied).

A–42. The judge charged that a "record of a conviction of a witness is admissible only on the question of his credibility. That is, the jury may consider the record on the question of whether to believe him" and give it "whatever weight they want. . . . An automobile violation, for example. I don't suppose anybody gives it any consideration at all. It doesn't prove anything." In this connection, the judge also charged, on the issue of credibility and reasonable doubt, that in considering truthfulness they might consider all that they knew about the person whose credibility was in issue "his past, his education, his intelligence, his reputation, anything you know about him." Under these instructions, to the full extent permitted by G. L. c. 233, § 21 (as amended through St. 1950, c. 426), the criminal record of each witness might be taken into account for all purposes relevant to credibility. These might include any bearing which the record might have on the witnesses' motive for testifying if that might affect credibility. Cf. *Commonwealth* v. *Stirling*, 351 Mass. 68, 72.

Baron's record included serious "automobile" violations (carrying a double-edged knife without a license in a motor vehicle, and an attempt to steal an automobile). Glavin's record included stealing an automobile. The judge, we think, cannot be regarded as referring to this type of offence in the portion of the charge now under discussion. Pretty clearly he was pointing out the difference in weight which might be given to serious offences and to automobile traffic offences. As each of these two witnesses had records of more serious offences, the reference to automobile offences (even if susceptible of misunderstanding as applying to crimes more than traffic violation) was not prejudicial.

A–43. On conspiracy the judge charged, "Conspiracy means that two or more people agree upon a plan to commit something that is criminal." Later, he said, "[E]ach of these defendants is to be considered as if he were the only defendant in this conspiracy case. Of course, he can't conspire with himself. . . . Two of them must be guilty. . . . One can't conspire with himself."

Baron, named in the conspiracy indictments as a coconspirator, had already pleaded guilty. Thus any one of the other defendants, on the evidence, could have been found guilty of conspiracy with him. The judge, as the context shown, was not instructing the jury that, regardless of the evidence, they must find two of the defendants guilty in any event.

COMMONWEALTH *vs.* RONALD ANTHONY CASSESSO (and a companion case).

Suffolk. October 5, 1971. — December 8, 1971.

Present: CUTTER, REARDON, QUIRICO, & HENNESSEY, JJ.

Practice, Criminal, New trial, Disclosure of evidence.

Statement of certain principles applicable in the disposition of a motion for a new trial of a criminal case. [575-576]

A prosecutor's duty to disclose marginally useful items of evidence to the defence must be measured by the directness of the materiality of the evidence in question together with the sheer volume of all of evidence in hands of the prosecution. [575]

No error in denial of motions for a new trial by defendants in a capital case appeared where the motions and supporting affidavits did not present facts or supportable sworn offers of proof of expected admissible evidence or sufficient basis for charges of suppression showing abuse of the judge's discretion or requiring as matter of law a new trial or even an evidential hearing on the motions. [576-579]

INDICTMENTS found and returned in the Superior Court on October 25, 1967.

Motions for a new trial were heard by *Forte,* J.

David Berman for the defendant Limone (*Ronald J. Chisholm,* for the defendant Cassesso, with him).

Jack I. Zalkind, Assistant District Attorney, for the Commonwealth.

CUTTER, J. Cassesso and Peter Joseph Limone were found guilty as accessories before the fact of the murder (on March 12, 1965) of Edward Deegan and of conspiracy to murder Deegan and Anthony Stathopoulos. Each of these defendants is under sentence of death. The facts which appeared at trial are stated at length in *Common-*

wealth v. *French*, 357 Mass. 356. In that case, this court affirmed the judgments.*

Each of these two defendants now has filed a motion for a new trial. Each motion purports to be supported by, or refers to, three affidavits (one of Mr. David Berman, counsel for Limone, dated May 6, 1970, one of William W. Stuart, apparently verified twice, viz. July 29, and August 4, 1970, and a brief and somewhat cryptic affidavit of Joseph Baron [also known as Barboza] dated July 28, 1970).

The Superior Court judge who presided at the original trial held a hearing on the motions on October 14, 1970. After examining one of the affidavits, the judge indicated he would "give counsel an opportunity to amend and put in affidavit form the evidence that would be offered in case there would be a new trial." At a later stage in the hearing, counsel for a defendant (Henry Tameleo) who, on this record, is not shown to have appealed from any denial of his motion for a new trial, informed the judge that he was "in process of obtaining other affidavits" and asked for additional time "to prepare affidavits that very well might be persuasive." The judge reiterated his intention, "if the district attorney's argument was well founded" to deny the motions, "but [to] give the defendants opportunity to amend, with additional affidavits" and that the denial would be "without prejudice" in all instances. Counsel for Tameleo then asked for thirty days in which to prepare additional material.

Counsel for Limone (Mr. Berman) contended that the issue then before the judge was "not whether there should be a new trial, but whether there should be evidence heard on . . . whether there should be a new trial." Mr. Berman,

* On June 29, 1972, the Supreme Court of the United States granted certiorari sub nom. *Limone* v. *Massachusetts* in the present cases and in *Commonwealth* v. *French*, vacated the judgments, but only insofar as they left undisturbed the death penalty imposed, and remanded the cases for further proceedings. 408 U.S. 933, 936. This was done in connection with the decision in *Furman* v. *Georgia*, 408 U.S. 238. See *Stewart* v. *Massachusetts*, 408 U.S. 845. REPORTER.

in effect, conceded "that the matters contained in the . . . sheets" attached to his own affidavit (described below) were hearsay, but requested an evidential hearing so that he might establish through other witnesses (apparently Officer John Doyle and Officer Thomas Robson) whether the "sheets" were a copy of an authentic, existing report. The judge pointed out to Mr. Berman that he could interview the persons mentioned in his affidavit and the attached sheets and submit later their affidavits. After a somewhat inconclusive discussion, the judge in effect ruled that Mr. Berman's affidavit was hearsay, and "on that ground," subject to an exception saved for all defendants, denied his motion for an evidential hearing on his own affidavit.

At the close of the hearing, the judge concluded (with respect to all the affidavits) that he would not deny the motions for new trials but allow the defendants thirty days to amend the motions and to file affidavits. The docket entries in the two cases now before us are set out in part in the margin.[1] Their motions were denied on November 17, 1970, after the thirty day period had expired, without the filing of any additional affidavits or other material. Cassesso and Limone appealed.

The Affidavits.

A short summary of each affidavit will facilitate discussion of the case.

(a) *The Baron affidavit.* Baron had been a vital, principal prosecution witness at trial. As was stated in *Commonwealth* v. *French*, 357 Mass. 356, 397 (hereafter cited *French*, p.__), "the principal issue before the jury was one of Baron's credibility." He was obviously "a highly vulnerable witness" with "a long criminal record." His

[1] "Oct. 14, 1970. Hearing on motion for new trial — Court defers finding and allows thirty days for counsel to file amendments to motions. . . . [A]ll defense counsel present. . . . Nov. 17, 1970. Commonwealth's motion to dismiss filed and allowed — Court orders defendant Limone's and Cassesso's motion for new trial denied and exceptions saved — motion to dismiss impounded . . . ."

present affidavit of only fifteen printed lines (as it appears in the record) recites that he was "free from duress or coercion"; that he wishes "to recant certain portions of . . . [his] testimony during . . . trial insofar as . . . [his] testimony concerned the involvement of Henry Tameleo, Peter J. Limone, Joseph L. Salvati and Lewis Grieco in the killing of Teddy Deegan," and that the testimony (not described) which he now offers "to give concerning the killing of . . . Deegan and those individuals responsible for his death will be the whole truth known to" him. There is no further substantive specification concerning (a) the parts of his trial testimony which he wishes to recant, (b) the testimony which he will give if there is a new trial, or (c) the place at which, or the circumstances in which, this affidavit was given.

(b) *The Stuart affidavit.* Stuart states (as of August 4, 1970) that he is a forty-one year old police officer, assigned to the intelligence section of the Boston police force, and then proceeds to assert the following matters, among others. On March 14, 1965, he interviewed Edward Bennett (unidentified) who told him that Baron, Roy French, "Stats" (later identified as Stathopoulos), Chico Amico (See *French*, p. 363, fn. 5), one Chiampa, Romeo Martin, and Cassesso participated in the Deegan murder. Stathopoulos and French led Deegan into an alley where all (except Stathopoulos and French) killed Deegan. Bennett said that Baron had told him the reason for killing Deegan was his friendship with enemies of a gang with which Baron was friendly. This information Stuart says he reported to Deputy Superintendent Blake, although Bennett was not identified in that report. Soon thereafter Stuart twice interviewed Martin (died or killed July 9, 1965; see *French*, p. 363, fn. 5, which contains an extended necrology of persons directly or indirectly connected with the trial), who had been (but then was no longer) an informant for him. Martin denied all direct knowledge of the killing but said he had been at the Ebb Tide Lounge in Revere with the

persons named by Bennett. He gave what purported to be a hearsay report of the murder similar to that given by Bennett but (apparently by inadvertence) at the "end of the narration, he said: '*I* saw somebody get the number of *my* registration plate as *we* were leaving the scene.'" Stuart in his affidavit claims that, in the summer and fall of 1967, but prior to October 25, 1967, he reported these conversations to Officer John Doyle, permanently assigned to the office of the district attorney for Suffolk County. No facts are set out in the affidavit concerning the circumstances in which the Stuart affidavit was given or the motives or inducements for giving it.

(c) *Mr. Berman's affidavit.* Mr. Berman states in his affidavit dated May 6, 1970, that on "May 5th or May 6th, 1970 an unknown person delivered to his office in a plain white envelope the pages, true copies of which are annexed to this affidavit. Affiant has never before . . . been aware of their existence. According to affiant's information and belief these pages are part of a report prepared for and by Officer John Doyle," and "this report was prepared before the [Superior Court] trial" of the defendants. Mr. Berman asserts that the report is "substantially inconsistent with testimony given against . . . Limone by . . . Baron and . . . Stathopolous [*sic*]." Also "[a]ccording to affiant's information and belief neither this report not [*sic*] the contents . . . were ever divulged to any person representing . . . Limone nor [*sic*] to . . . Limone himself, . . . [or] to any person likely to bring the contents . . . to the attention of . . . Limone or his counsel", but they were "available to the Assistant District Attorney who prosecuted the case against Peter Limone in the Superior Court." Beyond the statements quoted above, nothing appears of the circumstances in which Mr. Berman gave his affidavit. Attached to the affidavit is a document headed "John Doyle's Office 1–236 238–499 on September 8 — Stathopolous [*sic*]." This referred to a trip about September 8, 1967, to Maine by M. D. C. Officer Robson and State Trooper Endorato to

pick up Stathopoulos and take him to Massachusetts. That afternoon an interview between Stathopoulos and Baron took place near Barnstable. Stathopoulos was reported as having then told a story of the Deegan murder which need not be repeated here. We assume, as Mr. Berman asserts in his brief, that the story may contain some "prior inconsistent statement by Stathopolous [*sic*] [which] would" or might tend, at least indirectly, to impeach his credibility, and that the statement also may be in some respects arguably inconsistent with parts of Baron's testimony.

1. We have recently said that, upon "a motion for a new trial based upon recantation by a material witness, the duty of the trial judge is to give grave consideration to the credibility of the witness's new testimony" and that "the motion is addressed to his sound judicial discretion." *Commonwealth* v. *Robertson*, 357 Mass. 559, 562. See *Commonwealth* v. *Gwizdoski*, 284 Mass. 578, 581. See *Batsell* v. *United States*, 403 F. 2d 395, 402–403 (8th Cir.), cert. den. 393 U. S. 1094. This is in line with the usual rule that such motions are addressed to the sound discretion of the court. See *Commonwealth* v. *Devereaux*, 257 Mass. 391, 397–399. See also *Commonwealth* v. *Heffernan*, 350 Mass. 48, 52–54, cert. den. 384 U. S. 960. The judge was not obliged to believe the affidavits (see *Coonce* v. *Coonce*, 356 Mass. 690, 692).[2] The "possibility that the alleged newly discovered evidence might affect the result would not require," as

[2] We do not accept the extreme interpretation by defence counsel of *Cochran* v. *Kansas*, 316 U. S. 255, 257–258 (prison officials' suppression of appeal documents); *Pyle* v. *Kansas*, 317 U. S. 213, 215–216 (prosecution's alleged knowing use of perjured testimony); and *Williams* v. *Kaiser*, 323 U. S. 471, 473–477 (denial of counsel in capital case). These decisions (as we read them) do not purport to require a judge to accept as true allegations concerning the facts of alleged crimes contained in affidavits filed in support of motions for new trials. Those three cases seem to rest upon the prosecution's failure to controvert specific post-conviction allegations made by an apparently unrepresented prisoner about particular denials (during a prosecution) of his constitutional rights, which allegations, if true, required relief. The situation is unlike that here presented where the affidavits either inadequately set forth the facts relied on for relief or set forth largely (but probably not entirely) inadmissible expected hearsay testimony concerning the circumstances of a crime.

matter of law, the granting of a new trial. Such evidence, merely going to impeach the credit of a witness, will not ordinarily be the basis of a new trial. See *DeLuca* v. *Boston Elev. Ry.* 312 Mass. 495, 499–501; *Commonwealth* v. *Heffernan*, 350 Mass. 48, 54. The principles, stated above, apply to criminal as well as to civil cases, and, at a hearing on such a motion, the Massachusetts practice does not require (see *Commonwealth* v. *Millen*, 290 Mass. 406, 410) that the judge hear oral testimony. Indeed, such "motions . . . in both civil and criminal cases ordinarily are heard on the facts as presented by affidavit." *Commonwealth* v. *Coggins*, 324 Mass. 552, 556–557, cert. den. 338 U. S. 881. We consider the various issues raised in the light of these decisions.

2. The Baron affidavit is on its face indefinite and vague. It has no direct tendency to exonerate Cassesso for Baron does not purport to recant any testimony about Cassesso. It contains no statement showing the substance of the changed evidence which Baron would give about any of the other defendants, if afforded the opportunity. We see no abuse of discretion on the part of the judge in denying either Cassesso's motion or that of Limone so far as based upon this affidavit. The judge afforded counsel full opportunity to supplement their motions and this affidavit. The time granted by him expired without action in behalf of these defendants. It is open, of course, to each of these defendants to file a new motion for a new trial, if they become able to expand Baron's affidavit. See G. L. c. 278, § 29 (as amended through St. 1966, c. 301); *Commonwealth* v. *Kerrigan*, 349 Mass. 295, 296–297.[3]

3. Stuart's affidavit is largely, if not entirely, hearsay. It

[3] Although no abuse of discretion appears, it was open to the judge in his discretion to receive evidence, or to require affidavits, tending to establish in what circumstances Baron's affidavit was obtained, whether pressures had been exerted upon him, and what considerations may have affected him, as well as indication of the substantive new testimony he proposed to offer. Similar considerations might have led the judge to comparable evidential inquiries at least about the circumstances in which the other affidavits were given.

implicates Cassesso in the murder. It mentions the names of several potential witnesses not shown to have died. There is little in it to which Stuart could have testified directly. It was not unreasonable (so far as concerns the substance of what was there set forth) for the judge to fail to take action on it, until the defendants had exhausted the possibility of obtaining direct affidavits from persons mentioned in the affidavit, as the judge suggested might be done. No affidavit before us establishes (a) that obstacles have been put by the prosecution in the way of proper inquiry by defence counsel of any potential witness referred to in the Stuart affidavit; (b) that Stuart has been denied opportunity to supplement that affidavit if he can; (c) that any potential witness mentioned has been asked and has refused to talk to defence counsel; or (d) that defence counsel have been obstructed in access by the Commonwealth or its officers to any person mentioned in these affidavits and documents.

4. Mr. Berman's affidavit does not state the source of his information or the facts (apart from the document itself) which form the basis for his sworn statement, on "information and belief," that the document attached to his affidavit is "part of a report prepared for and by Officer . . . Doyle," or that the alleged report was "prepared before the [Superior Court] trial," or that it was "available to the" trial prosecutor. He states that he "has never before seen these pages, nor has he been aware of their existence," but he does not go so far as to assert that he had no knowledge of at least some of the matters mentioned in the document. The affidavit also does not go so far as to establish any direct and adequately specific request to the prosecution for documents of this type during or prior to trial, nor does it set forth relevant facts (with particular references to portions of the former record and of the 7,555 page trial transcript) which establish a duty on the part of the Commonwealth to disclose this report, even if the assistant district attorney

was aware of it.[4] See *French*, p. 399, pars. A–2, A–3.

We have recently stated that "the prosecutor's duty to disclose must be measured by the directness of the materiality of the . . . evidence in question to the defence taken together with the sheer volume of all the evidence in the hands of the prosecution." See *Commonwealth* v. *Beneficial Fin. Co. ante*, 188, 318 (a case where, of course, there was a much larger volume of potential documentary evidence than in the *French* case). Particularly is this true (p. 318) with respect to a "marginally useful item of evidence." The sworn facts set out in Mr. Berman's affidavit do not establish that this alleged report, even if authenticated, was more than "marginally useful" in view of the exhaustive examination of Stathopoulos at trial or that persons investigating Deegan's murder had any substantial reason to rely on its accuracy, if they knew about it.[5]

We are of opinion that, in the present cases, the attorneys for these defendants thus far have not presented facts, made supportable sworn offers of proof of expected admissible evidence, or shown sufficient basis for charges of

[4] The alleged police report has no direct tendency to exonerate Cassesso for it quotes Stathopoulos as saying "that he actually saw . . . Cassessa [*sic*] with a gun in his hand that night." Mr. Berman asserts in his brief that this alleged report would have been useful at trial, if established as authentic, as a basis of casting doubt on Stathopoulos's credibility by showing prior inconsistent statements.

[5] These defendants contend that certain cases require, or tend to require, the production of directly exculpatory material and evidence in the possession of the prosecution. See e.g. *Giles* v. *Maryland*, 386 U. S. 66, 74–78, 82–84, 97 (see also dissent beginning at 102); *Barbee* v. *Warden, Md. Penitentiary*, 331 F. 2d 842, 844–847 (4th Cir.); *Smith* v. *Florida*, 410 F. 2d 1349, 1350–1351 (5th Cir.); *United States* v. *Miller*, 411 F. 2d 825, 830–832 (2d Cir.). See also *Mesarosh* v. *United States*, 352 U. S. 1, 10–14; *Brady* v. *Maryland*, 373 U. S. 83, 87–88. It is not clear how these decisions (and others) deal with allegedly exculpatory, hearsay evidence principally useful for impeachment, where there has been shown no explicit defence request for such information and no prosecution frustration of defence efforts to obtain substantially relevant information. See *Link* v. *United States*, 352 F. 2d 207, 210–213 (8th Cir.); *United States* v. *Keogh*, 391 F. 2d 138, 146–149 (2d Cir.); *Rinehart* v. *Rhay*, 440 F. 2d 718, 726–727 (9th Cir.). See also *United States* v. *DeLeo*, 422 F. 2d 487, 498–499 (1st Cir.). Suppression of significant and material evidence favorable to a criminal defendant, where a defence request reasonably directs the prosecution's attention to it (see the *Keogh* case, 391 F. 2d 138, 147 [2d Cir.]), obviously is improper. Much, however, depends on the particular circumstances and the nature, importance, and relevance of the allegedly suppressed evidence.

suppression to require, as matter of law, at this time a new trial or even an evidential hearing on matters raised by their motions. Cf. the *Keogh* case, 391 F. 2d 138, 149 (2d Cir.). Cf. also *Townsend* v. *Sain*, 372 U. S. 293, 312–322. The judge has afforded them full opportunity to supplement the affidavits. This opportunity, especially in a capital case, obviously should remain open, as should the opportunity of these defendants to bring to the judge's attention any unreasonable frustration of their efforts to obtain access to witnesses whose testimony might constitute material, substantial evidence of a type which would require a new trial. We think the judge was warranted, in the circumstances, on this record, and at this stage of the proceedings (where Federal appellate review of the original convictions has not yet been completed) in ruling as he did, in effect without prejudice to later defence motions on a more complete record.

Orders allowing the Commonwealth's motion to dismiss and denying these defendants' motions for new trial affirmed.

United States Court of Appeals

FOR THE FIRST CIRCUIT.

No. 75-1336.

LEWIS GRIECO ET AL.,
PETITIONERS, APPELLANTS,

v.

LARRY MEACHUM, WARDEN, ETC., ET AL.,
RESPONDENTS, APPELLEES.

Judgment

Entered April 7, 1976

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
DANA H. GALLUP
Clerk.